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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO, APPELLANT,

vs.

B. A. WORTHINGTON, RECEIVER OF THE WHEELING
& LAKE ERIE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

FILED SEPTEMBER 7, 1911.

(22,852.)

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INDEX.

	Original	Print
Caption	<i>a</i>	1
Transcript from the circuit court of the United States for the north- ern district of Ohio.....	1	1
Caption	1	1
Bill of complaint.....	1	2
Exhibit 1—Amended complaint in case of Pittsburg Vein Operators' Association of Ohio <i>vs.</i> W. & L. E. R. R. Co.....	30	26
2—Amended answer in case of Pittsburg Vein Operators' Association of Ohio <i>vs.</i> W. & L. E. R. R. Co.....	33	29
3—Opinion of Railroad Commission of Ohio in case of Pittsburg Vein Operators' Association of Ohio <i>vs.</i> W. & L. E. R. R. Co.....	34	30
Subpœna and return	41	36
Order of service on absent defendants.....	43	38
Order to show cause.....	43	38
Certified copy of order for service with return	44	39

	Original	Print
Hearing on motion for preliminary injunction.	48	43
Plea of Edward Johnson to the jurisdiction of the court.	48	43
Plea of Pittsburg Vein Operators' Association <i>et al.</i> to the jurisdiction of the court.	50	45
Plea of Howard D. Mannington to the jurisdiction of the court.	51	46
Plea of Railroad Commission of Ohio to the jurisdiction of the court.	53	48
Order dismissing bill of complaint as to all defendants except Railroad Commission of Ohio.	55	49
Order granting leave to file answer.	55	50
Answer.	55	50
Replication.	64	57
Testimony.	65	58
Stipulation as to evidence.	65	58
Testimony of G. W. Ristine.	66	59
A. S. Dodge.	67	60
Edward Johnson.	67	60
W. R. Woodford.	68	61
J. J. Roby.	69	62
Frank Osborne.	69	62
C. E. Maurer.	72	64
B. A. Worthington.	86	76
T. R. Gilmore.	87	77
J. P. Orr.	90	79
H. M. Matthews.	91	80
Defendant's Exhibit 22—Statement of coal loaded and shipped, June 26, 1908.	93	81
Testimony of Mr. Maurer.	94	82
Exhibit No. 46—Statement of coal loaded and shipped, May 27, 1909.	104½	90
47—Charter confirmation.	105	91
47½—Bill of lading.	105	91
Testimony of Mr. Osborne.	105	91
Mr. Worthington.	109	94
Mr. Titus.	110	96
Clerk's certificate to testimony.	111	96
Opinion by Tayler, J.	112	97
Final decree.	118	102
Petition for appeal.	120	104
Assignment of errors.	120	105
Præcipe for transcript.	122	106
Bond on appeal.	122	107
Certificate of clerk.	123	108
Appearance.	125	109
Argued and submitted.	126	109
Decree.	127	110
Opinion by Severens, J.	129	110
Petition for appeal.	137	115
Assignment of errors.	139	116
Order allowing appeal.	143	118
Bond on appeal.	144	118
Clerk's certificate.	146	119
Citation and service.	147	120

a No. 2090.

United States Circuit Court of Appeals, Sixth Circuit.

RAILROAD COMMISSION OF OHIO, Appellant,

vs.

B. A. WORTHINGTON, Receiver of the Wheeling & Lake Erie
Railroad Company, Appellee,

Appeal from the Circuit Court of the United States for the Northern
District of Ohio.

Record.

Original Transcript Filed July 25, 1910.

1 *Transcript of Record.*

UNITED STATES OF AMERICA.

Northern District of Ohio, Eastern Division, ss:

Record of the proceedings of the Circuit Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the fifth day of said month in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth, to-wit: on the 25th day of June, A. D., 1910.

Present: The Honorable Robert W. Tayler, United States District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of the Wheeling & Lake Erie
Railroad Company,

vs.

RAILROAD COMMISSION OF OHIO et al.

Said action was commenced on the 28th day of March, A. D. 1910, and proceeding to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

(Bill of Complaint.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of the Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS Association of Ohio, Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

2

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division:

The above named complainant, B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company brings this, his bill of complaint, against the above named defendants, Railroad Commission of Ohio, a quasi body-corporate of the State of Ohio, Pittsburg Vein Operators' Association of Ohio, a voluntary association, having its principal office at Massillon, in said District, Frank M. Osborne its President residing in Cleveland, Ohio, Howard M. Mannington its Secretary, residing at Columbus, Ohio, C. E. Maurer, residing at Ravenna, Ohio, J. J. Roby and W. P. Murray, residing at Cleveland, Ohio, Edward Johnson, residing at Columbus, Ohio, John Doe and others members of said Association, and says:

I.

The Railroad Commission of Ohio is a quasi body-corporate created and organized under and pursuant to the laws of the State of Ohio with capacity to be sued in its corporate name and, as respects the matters and things hereinafter set forth, and as to the orders and rulings of said Railroad Commission, has assumed and pretended to act under delegated power from the legislature of the State of Ohio. The Commission is authorized to keep its office in the capital of the State of Ohio, to-wit: Columbus, and is authorized to hold sessions at any place other than the capital, as the convenience of the parties so requires.

The Pittsburg Vein Operators' Association of Ohio is a voluntary association of persons or corporations owning, controlling or operating coal mines in what is known as the No. 8 Ohio Coal District, situated in Jefferson, Harrison and Belmont Counties, Ohio; and the place of business of said association is in the city of Massillon, Ohio, within the Northern District of Ohio, Eastern Division thereof.

Frank M. Osborne is the President of said Pittsburg Vein Operators Association of Ohio, and is a citizen and resident of the State of Ohio and of the Northern District, Eastern Division thereof. Howard M. Mannington is the Secretary of said Association and is a citizen and resident of the State of Ohio residing at Columbus, Ohio, C. E. Maurer, residing at Ravenna, Ohio, and J. J. Roby and W. P. Murray residing at Cleveland, Ohio, are citizens and residents of the State of Ohio and of the Northern District, Eastern Division thereof, and are members of said association. Edward Johnson residing at Columbus, Ohio, is a citizen and resident of the State of Ohio, and is also a member of said Association, John Doe and others, whose names and residences are unknown to this complainant, are likewise members of said Association.

The Complainant, B. A. Worthington, is the duly appointed, qualified and acting Receiver of all the property rights and franchises of The Wheeling & Lake Erie Railroad Company, having been appointed as such on the 8th day of June, 1908, by the United States Circuit Court for the Northern District of Ohio, Eastern Division, in cause therein pending entitled "National Car Wheel Company, complainant, vs. The Wheeling & Lake Erie Railroad Company, defendant, in Equity," and, by order of said court made and entered in said receivership suit on the 28th day of March 1910, is authorized to file this bill of complaint against above named defendants.

II.

The amount in controversy in this action, which is a civil action, exceeds, exclusive of interest and costs, the sum of five thousand dollars, and is a controversy arising under the Constitution of the United States, to this, to-wit:

Your orator in all matters hereinafter referred to, and particularly in charging and enforcing the "lake-cargo coal" rate hereinafter mentioned, has acted and is acting under and pursuant to the order of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division thereof, in cause therein pending wherein the court took possession of the railroad, property, rights and franchises of The Wheeling & Lake Erie Railroad Company and appointed your orator Receiver thereof, and authorized and directed him to continue the operation of said railroad.

Your orator seeks relief against the defendants in this bill by reason of an attempt on the part of the said Railroad Commission of Ohio and the Pittsburg Vein Operators Association of Ohio and its officers and members to enforce against your orator a certain order of The Railroad Commission of Ohio prescribing a rate on lake-cargo coal, hereinafter mentioned, which constitutes an unlawful interference with the property constituting the receivership estate administered as aforesaid; and also to enforce against your orator a law of the State of Ohio depriving the owners of and persons interested in the property constituting the receivership estate of their property without due process of law and denying to them the equal protection

of the law, and obstructing the interstate commerce engaged in by your orator, in contravention and violation of the Constitution of the United States and especially contrary to Section 8, Article 4 1, and the 14th Amendment of said Constitution.

III.

Your orator shows that the property constituting the receivership estate consists of a single track railroad extending from Toledo, Ohio, to Steubenville and Martins Ferry on the Ohio River, and from Adena to St. Clairsville, and from Huron on Lake Erie to Norwalk Junction, aggregating approximately 272.83 miles in length, known as the Toledo Division of said railroad; from Cleveland to Zanesville, from Canton to Sharrodsville, and various small branches extending therefrom, aggregating approximately 235.03 miles in length, and known as the Cleveland Division of said railroad.

IV.

Your orator further shows that the issued and outstanding capital stock of said The Wheeling & Lake Erie Railroad Company is as follows:

Common Stock	\$20,000,000.00
First Preferred	4,986,900.00
Second Preferred	11,993,500.00
Total Stock Capital	\$36,980,400.00

The funded debt and equipment obligations of said railroad company are as follows:

Funded Debt.	Date of Issue.	When Due.	
1. Lake Erie Division			
First Mortgage	July 1, 1886.	Oct. 1, 1926.	\$2,000,000.00
2. Wheeling Division			
First Mortgage	Apr. 21, 1888.	July 1, 1928.	894,000.00
3. Extension and Improvement.			
First Mortgage	Dec. 20, 1889.	Feb. 1, 1930.	409,000.00
4. First Consolidated			
Mortgage	Sept. 1, 1899.	Sept. 1, 1949.	11,697,000.00
5. Three Year Gold			
Notes	Aug. 1, 1905.	Aug. 1, 1908.	8,000,000.00
Total funded indebtedness			\$23,000,000.00

Equipment Obligations.

6. Fidelity & Deposit Co. of Maryland Apr. 1, 1901.	Apr. 1, 1911.	73,000.00
7. Fidelity & Deposit Co. of Maryland May 1, 1901.	May 1, 1911.	24,000.00
8. Equipment Sinking Fund 5 per cent bonds Jan. 1, 1902.	Jan. 1, 1922.	1,798,000.00
5		
9. The Guardian Sav- ings & Trust Com- pany, Series A. Nov. 1, 1904.	Nov. 1, 1914.	165,000.00
10. The Guardian Sav- ings & Trust Com- pany, Series B. Nov. 1, 1904.	Nov. 1, 1914.	29,000.00
11. Commonwealth Trust Co., Series A. Dec. 1, 1904.	Dec. 1, 1914.	255,000.00
12. Commonwealth Trust Co., Series B. Dec. 1, 1904.	Dec. 1, 1914.	44,000.00
Total equipment obligations.....		\$2,388,000.00
Total bonds and obligations.....		\$25,388,000.00

Your orator further shows that, as Receiver of The Wheeling & Lake Erie Railroad Company, under and pursuant to orders made and entered from time to time in said receivership cause, he has borrowed money for the purpose of rehabilitating the property, the making of additions and betterments, paying the interest on underlying bonds for the purpose of preserving the integrity of the property and taxes amounting in the aggregate to \$4,002,350.00, itemized as follows:

July 1, 1908, for interest on Wheeling Division bonds	\$22,350.00
July 1, 1908, for property taxes.....	85,000.00
Sept. 1, 1908, for interest on 1st Consolidated Mtg. Bonds	234,000.00
Nov. 1, 1908, for rehabilitating property and comple- tion of Sugar Creek & Northern Railroad.....	1,820,000.00
Mar. 1, 1909, for interest on 1st Consolidated Mort- gage and taxes.....	373,000.00
May 1, 1909, for completion of shops at Brewster, and rehabilitation and improvement of property.....	1,429,000.00
Total.....	\$3,963,350.00

and has issued therefor Receiver's certificates maturing at different times but all maturing before May 1, 1911, and that under and pursuant to the orders of the court authorizing the issuance of said Receiver's certificates the income arising from the operation of the

railroads constituting the receivership estate is especially pledged for the payment of the principal and interest of said certificates.

Your orator further shows that the amount required annually in order to meet the interest on said funded debt, equipment, obligations and said Receiver's certificates, and the other payments

6 required under the equipment obligations is as follows:

(a) Annual interest on funded debt.....	\$1,033,030.00
(b) Principal payment on equipment obligations...	245,000.00
(c) Interest on equipment obligations.....	121,230.42
(d) Interest on Receiver's certificates.....	234,112.00
	<hr/>
	\$1,633,372.42

Your orator further shows that no dividends have been paid by the said The Wheeling & Lake Erie Railroad Company on any of its outstanding capital stock, common, first preferred or second preferred, at any time since the organization of said company, and that the said railroad company has defaulted in the payment of interest on its funded indebtedness as hereinafter set forth.

V.

Your orator further shows that, on or about the 8th day of June, 1908, the National Car Wheel Company, of New York, filed its bill of complaint against The Wheeling & Lake Erie Railroad Company in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, alleging the insolvency of the defendant the Wheeling & Lake Erie Railroad Company, and the necessity for the intervention of a court of equity, in order to marshal liens and protect all parties interested in the property of the said railroad company, and praying for the appointment of a receiver. To which said bill of complaint The Wheeling & Lake Erie Railroad Company filed its answer admitting its insolvency and joining in the request of the complainant for the court to take possession of its property through the instrumentality of a receiver, and to operate and control said railroad and to preserve and manage the entire property and business thereof. Thereupon the court appointed this complainant, B. A. Worthington, receiver of all and singular the property, assets, rights and franchises of The Wheeling & Lake Erie Railroad Company, including all railroads and other property and assets, rights and franchises of whatsoever kind and description and wheresoever situated, owned or operated by the said railroad company, authorizing and directing the said Receivership to keep the railroads and other property of said The Wheeling & Lake Erie Railroad Company employed and used as the same were theretofore used, and to continue the operation of said railroads, and to institute and prosecute all such suits as might be necessary in the judgment of the Receiver for the proper protection of the property and trusts thereby vested in him and of the business placed in his charge; that the

District of Ohio, Eastern Division, a bond in the sum of \$100,000, which said bond was approved by the judge of said court, and thereupon this complainant took possession of the said property, assets and franchises of The Wheeling & Lake Erie Railroad Company, and ever since has been and is now in possession of and operating the said railroads and property under and pursuant to the orders of said court.

Your orator further shows that subsequently, The Wheeling & Lake Erie Railroad Company having defaulted in the payment of the principal and interest due August 1, 1908, on its certain 3-year gold notes aggregating \$8,000,000.00 provided for in the deed of trust from The Wheeling & Lake Erie Railroad Company to the New York Trust Company, Trustee, dated August 1, 1905, and secured by \$12,000,000.00 of the General Mortgage Bonds of said company issued under and pursuant to the terms of the mortgage or deed of trust from The Wheeling & Lake Erie Railroad Company to the Central Trust Company of New York, trustee, and having also defaulted in the payment of interest on said \$12,000,000 of General Mortgage Bonds the Central Trust Company, of New York, as trustee under said mortgage or deed of trust dated August 1, 1905, securing said \$12,000,000 of bonds, by leave of court first had and obtained, filed its bill of complaint against The Wheeling & Lake Erie Railroad Company in the United States Circuit Court for the Northern District of Ohio, Eastern Division thereof, praying for a foreclosure of its said mortgage and for the appointment of a receiver. Whereupon the said court, on the 18th day of September, 1908, appointed the complainant herein, B. A. Worthington, as receiver of all the property, rights and franchises of said The Wheeling & Lake Erie Railroad Company, with authority to continue to operate said property and with the same power given in the order appointing the said B. A. Worthington receiver made and entered upon the bill of complaint of the National Car Wheel Company as aforesaid, and consolidated the said National Car Wheel cause with the action commenced by the Central Trust Company of New York, trustee, and docketed the same as "Consolidated Cause; Central Trust Company of New York, Trustee, complainant vs. The Wheeling & Lake Erie Railroad Company, defendant; No. 7603;" that said B. A. Worthington, under and pursuant to the said order made and entered

8 in the said foreclosure proceeding, took possession of all the property of said The Wheeling & Lake Erie Railroad Company, and ever since has been and now is in possession of the same; and, in all of the matters and things hereinbefore and hereinafter referred to, acts under and pursuant to the orders appointing him as such Receiver, and other orders made from time to time by said court prescribing the manner in which your orator shall further discharge his duties respecting the property constituting the receivership estate.

VI.

Your orator further shows that there are three coal-producing districts situated on and served by the railroad constituting the receivership estate, all in the State of Ohio, and known as (a) the Massillon

District, situated in Stark and Wayne counties, producing a very fine quality of coal suitable for domestic purposes; (b) the Middle District, situated in Coshocton, Holmes, Carrol and Tuscarawas counties, likewise producing a coal suitable for domestic purposes; and (c) the No. 8 Ohio District, situated in Jefferson, Harrison and Belmont counties, producing a coal particularly adapted for use by industries and railroads in producing steam for manufacturing and other purposes. The defendants and other members of The Pittsburg Vein Operators' Association of Ohio are interested in mining operation in said No. 8 Ohio District.

Bituminous coal from all districts, for tariff purposes, is classified by your orator as (a) railway fuel; (b) lake-cargo; (c) commercial coal. The first comprises coal sold to railroad companies at junction points on the railroad constituting the receivership estate, and used by said connected railroads for engine and other fuel purposes. The second includes coal going from mines in the State of Ohio to points in the vicinity of the head of the Great Lakes and thence to points in the northwestern part of the United States, via rail from mines to ports on Lake Erie in Ohio known as the "lower lake ports" and thence by vessel to ports at the head of the Great Lakes and known as "upper lake ports." The third comprises coal used for commercial and domestic purposes either at points on your orator's railroad and known as local coal, or at points on the lines of connecting carriers known as through coal, not included in the first two classes.

VII.

Your orator shows that the "lake-cargo coal" transported over the railroad constituting the receivership estate moves through either the Cleveland or Huron port; that very little lake cargo coal goes through the Cleveland gateway owing to the fact that your orator's docks at such port are situated so far up the Cuyahoga River as to make towage necessary for vessels coming to said docks, thereby requiring persons using your orator's railroad in the lake cargo trade at such port to incur an expense not required if they use docks of other railroads at Cleveland or the dock of your orator at Huron; that practically all of the lake cargo coal moved over your orator's railroad, for the reasons above stated moves to the northwest to points outside the State of Ohio via Huron, Ohio, where your orator has large dock facilities capable of handling a large amount of lake-cargo coal in an economical and efficient manner; and that the average distance from the various mines in the No. 8 District served by your orator's railroad to the Huron dock is approximately 155 miles.

Your orator further shows that he has in operation at the docks in Cleveland and Huron, expensive machinery and appliances for unloading said lake-cargo coal from cars and loading said coal into the holds of vessels, and for trimming the said coal when in the holds of vessels, so that it may be properly and safely transported by said vessels from lower Lake Erie ports to upper lake ports beyond the State of Ohio and that greater effort is required to handle said lake-cargo coal than is required to handle any other kind of coal on your orator's railroad.

VIII.

Your orator further shows that, at the time of the filing of the complaint with the Railroad Commission of Ohio as hereinafter set forth, and ever since, your orator has had in effect on the railroad constituting the receivership estate, as appears from the tariffs duly issued by your orator and filed with the Interstate Commerce Commission in the manner required by the laws of the United States in such cases made and provided, and particularly by the Act to Regulate Commerce passed March, 1887, and acts amendatory thereof and supplementary thereto, which said tariff was issued March 27, 1908, effective May 1, 1908, I. C. C. No. 24, pages 5, 15 and 175, a rate on "lake-cargo coal" moving from mines in Ohio to points in the north-west outside of the State of Ohio of 90 cents a ton, carload lots, from mines No. 8 District f. o. b. vessels Huron and Cleveland, which said rate of 90 cents is applicable only to coal moving in interstate commerce from the mines in the No. 8 district to points in the north-western part of the United States outside of the State of Ohio, via rail to lower Lake Erie ports and thence by vessels up the Great Lakes as aforesaid; that all the operators on your orator's railroad for several years past have engaged in said lake-cargo trade, and, in order to properly conduct said interstate commerce in lake-cargo coal have acquired or control docks, or have close relations with persons owning or controlling docks at the head of the Great Lakes; that said coal operators have availed themselves of said lake cargo-rate in conducting their said interstate commerce in lake-cargo coal trade, during all of said years, and, in pursuance thereof, have made and make it the custom and practice, at the opening of navigation in each year or a short time prior thereto, to arrange with persons owning or controlling vessels plying upon the Great Lakes for the vessel carriage to take care of the lake-cargo coal and operators expect to transport from the mines in the No. 8 District of Ohio to points outside of the State of Ohio via your orator's railroad and said vessels, all of which is known to your orator and to persons owning or controlling said vessels, and is done by and with your orator's consent and approval; that all such coal is billed as "lake-cargo coal" and actually moves through Huron and Cleveland ports to points without the State of Ohio, and the operators and persons owning vessels, as well as your orator, in taking part in said lake-cargo trade, not only intend to but actually do engaged in interstate commerce; that said lake cargo coal is by said parties, to-wit: your orator, the operator and vessel-owner, actually transported from mines in Ohio to docks at the head of the Great Lakes outside of the State of Ohio by continuous carriage, broken only by the necessary unloading from cars into vessels; and that said lake-cargo coal, after leaving the mines in the No. 8 District in Ohio, is continuously in the possession of the carriers performing the transportation service until delivered to the consignee at the point of destination at the head of the Great Lakes, outside of the State of Ohio.

IX.

Your orator further shows that said lake-cargo rate is in fact a "proportional rate" applicable only to coal moving from points in Ohio to points outside the State of Ohio via Huron or Cleveland, as above set forth, and if coal is billed to Huron as Lake-cargo coal on said lake-cargo rate, and the consignee or owner subsequently changes its destination or diverts it to use at Huron, either en route or at Huron before it is loaded into vessels by your orator, the said lake-cargo rate is not applicable, but, on the contrary, the commercial rate to such changed destination applies, which, in case the coal is used at Huron, would be the commercial rate from the No. 8 District to Huron, to-wit: one dollar per ton in carload lots.

11 Your orator further shows that the said lake-cargo rate requires your orator to perform for the shipper and the vessel owner a loading service, to-wit: unloading said lake-cargo coal from cars and putting the same into the holds of vessels thereby requiring your orator, by and with the consent of the vessel-owner, to go into the hold of the vessel engaged in interstate commerce to trim the said coal, that is, properly distributing the coal in the hold of the vessel so that the vessel may safely proceed on its interstate journey to points on the Great Lakes outside the State of Ohio; that unless your orator performs such loading and trimming service it would be necessary either for the shipper or the vessel-owner to do so, and that said loading and trimming service is an integral part of the interstate commerce engaged in by the vessel-owner, the coal operator and your orator in the transportation of said lake cargo coal: that said unloading and loading and trimming and the rail carriage constitute an entire service performed by your orator incapable of division under the contract between the parties evidenced by the tariff aforesaid, and required to be performed by your orator for the shipper of lake-cargo coal and the owner of the vessel in connection and as a part of the interstate commerce engaged in by the parties carrying on said lake-cargo trade, to-wit: the coal operator, your orator, and the owner of the vessel.

X.

Your orator further shows that there is a coal-producing district in Allegheny and Washington counties in the western part of the state of Pennsylvania, known as the Pittsburg District. The coal produced in said district is similar to that mined in the No. 8 District of Ohio; that said Pittsburg District is served principally by the Pennsylvania Company, New York Central Lines and the Baltimore & Ohio Railroad, and that the short-line workable mileage from said district to lower Lake Erie Ports via which the lake-cargo coal may be shipped from said Pittsburg District to the head of the Great Lakes in competition with the lake-cargo coal from the No. 8 Ohio District, is approximately 160 miles: that the ports of said railroads (not including your orator's) so serving said Pittsburg District are Conneaut, Ashtabula, Fairport, and Cleveland; that your orator's lines of railroad connect with the railroad of the Wabash-Pittsburg Terminal Railway Company at Pittsburg Junction, Ohio, which said last



named railroad extends from Pittsburg Junction to Pittsburg Pennsylvania, and there connects with the railway of the West Side Belt Railroad Company, a belt-line railroad in the vicinity of Pittsburg;

12 that said Wabash-Pittsburg Terminal Railway Company and the West Side Belt Railway company serve some of the mines in the said Pittsburg District, and their said railroads, in connection with the railroad constituting the receivership estate, form a through route from said Pittsburg District to Huron gateway for the transportation of lake-cargo coal from mines in said Pittsburg District to points in the northwest; that there are a number of mines situated on the said Wabash-Pittsburg Terminal and West Side Belt railroads which have no other railroad facilities except such as are afforded by said railroads and are dependent entirely upon the said railroads of the Wabash-Pittsburg Terminal Railway Company, the West Side Belt Railroad Company and your orator for transportation of lake-cargo coal; that all railroad companies so serving the said Pittsburg District including your orator have in effect a lake-cargo rate from said district to lower Lake Erie ports applicable to coal moving to the northwest via rail and vessel which is 3 cents higher per ton than the rate on lake cargo coal from the said No. 8 Ohio District.

Your orator shows that a large portion of the coal moving over your orator's railroad not included in said lake-cargo trade goes to points outside of the State of Ohio; that the necessary effect of a reduction in the lake-cargo rate will be to require your orator to make a corresponding reduction in all its other interstate rates; that he entire coal-rate structure is so adjusted, both as to state and interstate commerce, as to make it impossible to reduce the lake-cargo rate without making a corresponding reduction in all coal rates, both state and interstate, and the effect of any regulation of the said lake-cargo rate is to directly affect the rates on interstate commerce engaged in by your orator, will necessarily prohibit your orator from engaging interstate commerce except at great loss of revenue, and will constitute a direct regulation of said interstate commerce rates in effect at present, all of which are reasonable and just; and that if the proposed lake-cargo rate set forth in the order of the Railroad Commission, herein referred to, is made effective, the result will be either to prohibit your orator from engaging in such interstate commerce, or if engaged in, to do so at great loss of revenue.

XI.

Your orator shows that the result of the operation of The Wheeling & Lake Erie Railroad since the organization of the company to the end of the fiscal year, June 30th, 1909, is as follows:

(Here follows tabular statement marked page 12½.)

13 While the foregoing shows a net income for the year ending June 30, 1909, of \$27,431.75, an examination of the operating statistics will show that this apparent net income is due to the fact that no interest was paid by your orator upon the \$8,000,000.00 three-year gold notes of the said The Wheeling & Lake Erie Railroad Company and that interest amounting to \$311,920 was paid out of the proceeds of Receiver's Certificates; that if your orator had paid the interest on said three-year notes and other interest taken care of from Receiver's Certificates aforesaid, out of earnings of your orator's property, as proper operation of the property, the deficit for the year 1909, would have been \$684,488.25. The net income shown for the fiscal year from 1900 to 1904 inclusive and 1906 and 1907 was used by The Wheeling & Lake Erie Railroad Company in making improvements and extensions of its property to such an extent that the company was not in a position to use said net income for the purpose of taking care of the deficits resulting from the operation of the railroad for the years 1905 and 1908. The greater portion of the income denominated "Other incomes" in the foregoing statement was obtained from The Wheeling & Lake Erie Railroad Company from the sale of certain property acquired by it from the proceeds of net income earned in previous years and used in order to take care of the interest on the funded debt of the company. During the Receivership the Receiver has been required to expend \$761,562.39 proceeds of Receiver's Certificates for the purpose of rehabilitating the property made necessary because of the inability of the railroad company in previous years to properly maintain the railroad out of the income.

If proper consideration is given to the foregoing, the operation of the property constituting the Receivership estate making provision only for the payment of interest on funded indebtedness with no provision for any dividend on stock would show a deficit for the said period from 1900 to June 30, 1909, of \$549,708.22 which is approximately \$54,970.82 per annum.

XII.

Your orator further shows that an analysis of the earnings and expenses and freight statistics for the years 1907, 1908 and 1909, when the property was being operated by The Wheeling & Lake Erie Railroad Company and your orator respectively is as follows:

14	Account.	1907.	1908.	1909.
	Gross Operating Revenue....	\$6,124,206.78	\$5,379,001.24	\$5,633,644.99
	Operating Expenses.			
	Maintenance of Way and Structures.....	728,469.13	667,479.45	617,956.55
	Maintenance of Equipment ..	1,041,571.69	1,148,755.29	1,380,977.67
	Traffic Expenses.....	79,757.51	79,757.51	74,230.66
	Transportation Expenses.....	2,197,808.78	2,249,368.10	1,947,807.09
	General Expenses.....	157,520.30	152,883.68	179,745.87
	Total.....	\$4,125,369.90	\$4,298,244.07	\$4,200,717.84
	Percentage of Operating to Operating Revenue.....	67.36	79.64	74.56
	Net Operating Revenue.....	\$1,998,836.88	\$1,098,757.17	\$1,432,927.15
	Freight Statistics.			
	Gross Freight Revenue.....	\$5,440,727.46	\$4,455,438.81	\$4,804,421.95
	Revenue Tons Carried.....	9,608,590	7,818,298	8,331,704
	Revenue Ton Miles.....	1,130,880,732	933,018,545	889,916,252
	Company Ton Miles.....	52,957,373	44,246,526	46,716,296
	Total Revenue and Company ton Miles.....	1,183,838,105	977,265,071	939,632,548
	Gross Ton Miles including Wt. of Engine and Tender.....	2,425,689,703	2,122,059,948	2,003,558,985
	Average Distance Haul one Ton (revenue).....	117.7	119.3	106.8
	Freight Train Miles.....	1,869,406	1,624,261	1,510,844
	Mileage of Loaded Cars.....	37,715,458	31,232,144	30,578,882
	Mileage of Empty Cars.....	19,781,737	19,355,226	17,165,877
	Unbalanced Traffic, per cent.	41.36	44.62	40.27
	Average Net Tons per Train Mile.....	633	602	620
	Average Net Tons per Locomotive Mile.....	571	552	568
	Average Gross Tons per Train Mile.....	1,298	1,306	1,326
	Average Gross Tons per Locomotive Mile.....	1,169	1,199	1,216
	Average Tons per Loaded Car	31.39	31.26	30.63
	Average Loaded Cars per Train.....	20.18	19.23	20.24
	Average Empty Cars per Train.....	10.58	11.92	11.36
	Average Revenue per Ton, cts.	56.62	56.98	57.66
	Average Revenue per Ton Mile, etc.....	.481	.478	.540

XIII.

Your orator further shows that under the interstate commerce classification, operating expenses are classified as (a) maintenance of way and structures; (b) maintenance of equipment; (c) traffic expenses; (d) transportation expenses; and (e) general expenses; and these various classes are further subdivided, so that there are in all one hundred and five items included in the different sub-heads as aforesaid; that approximately 60 per cent of the said expenses are fixed and must be taken care of, irrespective of the volume of business transported, while approximately 40 per cent of the said expenses fluctuates with the volume of traffic. Approximately 20 per cent to 25 per cent of all operating

expenses can be allotted to a particular train, while 75 per cent to 80 per cent is of a general character incident to all services and incapable of being allotted to any particular train or movement except upon an arbitrary basis, and that therefore such particular portion of expenses, to-wit: 75 per cent to 80 per cent is known as joint costs, and there is no proper unit of measurement by which the proportion of such joint costs may be charged to a particular traffic. Various units have been suggested, such as train-miles, car-miles, ton-miles, and revenue basis, but each and every such unit overlooks the fact that a great many commodities either cannot pay such theoretical proportion of these joint costs, or that competition requires the railroad to haul some commodities at a rate insufficient to cover such theoretical proportion of such joint costs and the relation between said units and the proportion chargeable to a particular traffic using any particular unit, or any combination of such units, varies from time to time, depending upon operating cost and volume of business.

Your orator further shows that the cost of moving traffic is variable, perhaps never twice the same, depending upon train-loads, track, traffic density, maintenance, and other considerations, so that there are varying units at different periods among which to apportion the said 20 per cent to 25 per cent of operating expenses known as direct expenses incident to handling a particular train, and consequently the actual cost of handling all traffic is unknown until total operating expenses and total volume of business have been ascertained. Your orator shows that the great body of expenses on a railroad is a distinct thing from the great body of earnings, and that the only practical measure of cost is the relation that the cost of handling all traffic bears to all revenues; that is, the ratio of all operating expenses in the aggregate to all the revenues in the aggregate.

The empty train returning to the originating point requires certain expenditures which cannot be charged to any particular traffic. Any attempt to arrive at the cost of the movement of a particular commodity which moves over the main line by the use of any one of any combination of units of measurement in distributing the joint costs, ignores the cost of maintenance and operation of branch lines (of which your orator's railroad has several) where
16 the arbitrary costs units are usually very much higher than on the main line. Yet these branch lines serve as feeders to the main line and are of great value to the company because the density of traffic on the main line is largely due to such feeders and without them the main line would only get such business as would be tributary to itself and that by reason of the foregoing it is impossible to ascertain the cost of moving a particular traffic.

Your orator shows that the total operating revenue of the property constituting the receivership estate, as set forth above, has been insufficient, since 1900, and still is insufficient to pay the operating expenses of said property, and the fixed charges accruing upon its funded debt and the receivers' certificates issued by your orator as aforesaid; that the property is reasonably worth a sum far in ex-

cess of the aggregate amount of said funded indebtedness and receiver's certificates and that the owners of and parties interested in the property constituting the receivership estate have at no time received that return upon their property to which they have been and are entitled.

XIV.

Your orator further shows that an analysis of the gross freight earnings obtained by your orator from the operation of the property constituting the receivership estate for the year ending June 30, 1909, classifying the tonnage as appears in said statement, the revenue, the average-haul miles, the average rate per ton in cents, and the average rate per ton mile in cents is as follows:

	Tons.	Ton miles.	Revenue.	Average haul, miles.	Average rate per ton, cents.	Average rate per ton mile in cents.
Coal.....	3,893,760	501,269,869	\$2,538,053.05	128.	50.	.466
Ore.....	568,850	80,014,959	282,899.16	140.6	49.7	.353
Flux stone.....	100,422	17,272,673	36,326.41	172.	36.2	.210
Furnace products..	442,484	79,129,400	422,670.76	179.	95.5	.534
Brick	152,934	16,589,145	90,348.09	109.1	59.4	.544
Flour.....	30,340	4,970,400	16,295.07	163.6	53.7	.330
Selected Comdts....	244,478	20,585,434	169,783.43	84.2	69.4	.825
Other Comdts.....	2,899,336	170,084,285	1,448,045.98	58.6	49.9	.851
Total Tonnage and Revenue.....	8,331,704	889,916,252	\$4,804,421.95	106.8	57.7	.540

That the said ore flux-stone and flour move eastwardly in the direction of empty car movement, and is handled in cars that would otherwise be moved empty, and are moved by engines that would otherwise handle no revenue tonnage. The rate on iron ore is fixed by shorter competitive lines, so that your orator is either compelled to make the same rate or go without the business. The rate on limestone is fixed by competition with quarries located in Eastern Ohio and Western Pennsylvania, which rate your orator is required to meet in order to secure the tonnage. An increase in the rate on either product would place the steel-producing mills in the Ohio Valley located on your orator's line of railroad, in a position where they could not compete with the steel-producing mills in the Pittsburg district, and your orator would therefore not receive from the steel-producing mills in the Ohio valley the finished product which your orator now receives for transportation and which yields revenue considerably in excess of that on the raw material. The rate on flour is governed by competitive conditions, not only by through rates, but by different producing centers. It is to the advantage of the receivership estate that the said ore, flux-stone and flour should be taken at the said low rates rather than to go without the tonnage, inasmuch as said low rates yield your orator more than the extra expense incurred in handling the particular traffic; that is, more than the direct expenses as defined above, thereby placing your orator in funds applicable to the payment of joint costs which otherwise would be put upon the other traffic.

While the total rate per ton mile on all classes of freight for 1909 is 5.40 mills, if coal, iron ore, flux-stone and flour are eliminated from said total tonnage and revenues, the rates on all other commodities yield a revenue of 7.44 mills per ton mile, and this notwithstanding the fact that a large portion of the tonnage included under the head "Furnace Products" moves from Cleveland to Toledo, a distance of 210 miles, yielding a return of 4.1 mills per ton miles in competition with the Lake Shore & Michigan Southern company, whose line is 113 miles, taking the same rate and yielding it an earning of 7.09 mills. The low average rate per ton mile on all traffic is incident to the fact that your orator's railroad in the majority of instances, is the long-haul route, and is required to compete with short-haul railroads at rates lower than your orator would be willing to carry the same tonnage did not competitive conditions require, but that it is to the advantage of the receivership estate that your orator should be permitted to meet such competitive conditions whenever said competitive rates will yield more than enough to pay the direct operating expenses and leave a sum applicable to the payment of the joint operating expenses, thereby redounding to the benefit of the non-competitive traffic.

Your orator further shows that the railroad constituting the receivership estate is used not only for the transportation of commodities moving between points within the state of Ohio,
 18 but commodities moving from the points within to points without the state of Ohio.

XV.

Your orator shows that an analysis of the total coal tonnage and revenue by districts shipped over the line of railroad of your orator for the fiscal years ending June 30, 1907, and 1909 is as follows:

1—No. 8 District.

Nature of shipment.	Tons.	Revenue.	Average haul, miles.	Average rate per ton per mile in cents.	Per cent.
A—Local.....	432,402	\$317,922.05	117	.62	9.47
B—Through.....	281,206	206,179.44	183	.39	6.16
C—Lake.....	455,842	410,257.80	155	.58	9.98
D—R. R. Fuel.....	1,090,579	700,823.46	183	.35	23.88

2—Middle District.

A—Local.....	487,273	285,158.96	71	.83	10.67
B—Through.....	23,682	13,132.32	134	.42	.52
C—Lake.....	4,446	3,335.21	128	.59	.10
D—R. R. Fuel.....	13,700	7,064.50	127	.41	.20

3—Massillon District.

A—Local.....	237,351	149,150.20	89	.70	5.20
B—Through.....	136,603	59,597.67	85	.51	2.99

4—W. P. T.

B—Through.....	395,946	186,733.37	165	.29	8.45
C—Lake.....	903,863	423,346.07	135	.35	19.79

Nature of shipment.	Tons.	Revenue.	Average haul, miles.	Average rate per ton per mile, in cents.	Per cent.
5—Other Connections.					
B—Through	113,407	33,201.94	42	.60	2.49
6—Total.					100.0
A—Local.....	1,157,026	752,231.21	91.8	.71	25.34
B—Through.....	940,814	492,844.71	141.8	.37	20.60
C—Lake.....	1,364,151	836,939.08	141.6	.43	29.87
D—R. R. Fuel.....	1,104,279	707,887.96	182.8	.35	24.19
Less overcharges and W. P. T. Guarantee.....					
	4,500,300	\$2,789,902.96			100.00
		230,934.03			
		2,558,968.93			
19					
1—No. 8 District.					
A—Local.....	306,195	\$339,727.76	107	.73	7.86
B—Through.....	607,207	374,297.98	150	.41	15.59
C—Lake.....	387,705	350,885.78	155	.38	9.96
D—R. R. Fuel.....	963,318	662,761.27	181	.38	24.74
2—Middle District.					
A—Local.....	430,515	234,016.53	64	.84	11.06
B—Through.....	18,851	8,315.16	107	.41	.48
C—Lake.....	1,352	984.06	134	.54	.03
D—R. R. Fuel.....	13,156	7,564.70	127	.45	.34
3—Massillon District.					
A—Local.....	138,590	85,546.57	72	.85	3.56
B—Through.....	68,528	30,697.61	89	.50	1.76
C—Lake.....	508	355.92	90	.77	.01
4—W. P. T.					
B—Through.....	256,404	104,507.09	102	.39	6.59
C—Lake.....	462,756	218,288.01	135	.35	11.89
5—Other Connections.					
B—Through.....	238,675	66,351.12	35	.80	6.13
6—Total.					100.00
A—Local.....	875,300	559,310.86	81	.79	22.48
B—Through.....	1,189,665	584,168.96	112	.43	30.55
C—Lake.....	852,321	570,513.77	142	.47	21.89
D—R. R. Fuel.....	976,474	670,325.97	180	.38	25.08
Less Overcharges.....					
	3,893,760	\$2,384,319.56			100.00
		46,266.51			
		\$2,338,053.05			

XVI.

Your orator further shows that the average distance from the No. 8 District to the docks at Huron is approximately 155 miles; that the average distance from Huron to points in the Northwest where said coal is consumed is approximately 900 miles, making a total distance of approximately 1,050 miles; that the average water rate in force during the period of navigation on the Great Lakes is approximately 30 cents, making the total carrying charge on said coal from the mines in the No. 8 District to the point of consumption at the head of the Great Lakes approximately \$1.29, that
 20 the lake cargo rate on your orator's railroad on No. 8 coal for the past twenty years has been as follows:

Year.	Rate.
1888.....	85c f. o. b. dock
1889.....	85c f. o. b. dock
1890.....	85c f. o. b. dock
1891.....	85c f. o. b. dock
1892.....	85c f. o. b. dock
1893.....	90c f. o. b. dock
1894.....	90c f. o. b. dock
1895.....	87½c f. o. b. dock
1896.....	87½c f. o. b. dock
1897.....	87½c f. o. b. dock
1898.....	87½c f. o. b. dock
1899.....	90c f. o. b. dock
1900.....	77½c f. o. b. dock
1901.....	73c f. o. b. vessel
1902.....	75c f. o. b. vessel
1903.....	85c f. o. b. vessel
1904.....	85c f. o. b. vessel
1905.....	85c f. o. b. vessel
1906.....	85c f. o. b. vessel
1907.....	90c f. o. b. vessel
1908.....	90c f. o. b. vessel
1909.....	90c f. o. b. vessel

That the reduction in rate from 1900 to 1903 was due to rate wars; that the increase in 1907 was required because of the great increase of cost of all things entering into the transportation business; and that such increase in rate was in the same proportion as the increase in rates on all other commodities transported by your orator made at the same time.

XVII.

Your orator further shows that the lake-cargo tonnage from mines on your orator's railroad has increased steadily for the past several years, the tonnage being as follows:

1907

	Tons	Ave. Rate	Revenue	Rate	Revenue	Loss
Lake Coal, W. & L. E.	460,288	192 8c	\$413,593 01	70c	\$322,901 60	\$91,391 41
" " W. S. B.	790,257	46 2c	365,860 12	31 8c	251,901 72	114,558 40
" " W. P. T.	113,606	50 6c	57,485 95	43 5c	49,418 61	8,067 34
All Other Coal	3,319,673	51 8c	1,732,029 85	41 8c	1,387,634 15	334,405 70
	4,683,826		\$2,558,908 93		\$2,010,516 08	\$548,422 85

1908

	Tons	Ave. Rate	Revenue	Rate	Revenue	Loss
Lake Coal, W. & L. E.	447,654	190 5c	\$404,736 68	70c	\$315,342 80	\$91,392 88
" " W. S. B.	640,965	45 c	288,811 65	31 8c	203,816 87	\$4,994 78
" " W. P. T.	142,986	54 7c	78,312 60	43 5c	62,108 91	16,113 69
All Other Coal	2,960,126	56 4c	1,670,490 02	46 4c	1,373,498 96	296,991 06
	4,191,711		\$2,442,350 95		\$1,952,858 04	\$489,492 91

1909

	Tons	Ave. Rate	Revenue	Rate	Revenue	Loss
Lake Coal, W. & L. E.	389,565	190 4c	\$352,225 76	70c	\$272,605 50	79,530 26
" " W. S. B.	435,644	46 5c	502,817 51	31 8c	138,534 79	64,282 72
" " W. P. T.	27,112	57 c	15,470 50	43 5c	11,763 72	3,676 78
All Other Coal	3,041,489	58 1c	1,767,538 28	48 1c	1,462,932 16	304,606 12
	3,893,760		2,388,052 05		\$1,885,926 17	\$452,095 88

†Excess over 90c per ton caused by vessel fuel rate of 95c included in Lake Coal, and rate 0 less than 90c accounted for account of vessel fuel rate being 85c in year 1907.



Year.	Tons.
1906.....	235,121
1907.....	478,438
1908.....	447,047
1909.....	486,322

and that the lake-cargo output from all Ohio districts on all railroads as compared with the lake-cargo output from the coal districts in Pennsylvania and West Virginia is as follows:

21

State.	District.	1903.	1908.	Percentage of increase.
Ohio	No. 8	536,738	1,316,946	145 %
Ohio	Hocking	1,631,485	1,378,465	15.5% *
Pa.	Pittsburg	5,460,215	7,541,611	38 %
W. Va.	Fairmount	1,119,288	1,226,329	9.6%
W. Va.	Kanawha	393,115	1,451,379	269 %
W. Va.	Thacker	344,575	843,441	144 %

* Decrease.

XVIII.

Your orator further shows that said rate on lake-cargo coal of 90 cents in car load lots from mines in the No. 8 district f. o. b. vessel at Huron and Cleveland is a reasonable and just rate; that it bears a proper relation to all other rates in force on the railroad operated by your operator; that it moves in the lake-cargo traffic freely, as set forth above, and that a reduction in said rate will necessarily require a complete readjustment of all coal rates, both state and inter-state that a reduction in the lake cargo rate such as is proposed in the order of the Railroad Commission of Ohio, hereinafter referred to, to-wit: 20 cents, will require your orator to reduce his proportion of the lake-cargo rate on coal coming from the Pittsburgh district at least 15 cents per ton, and will require your orator to further reduce all other coal rates approximately 10 cents a ton, resulting in a decrease in the earnings of your orators' railroad of approximately half a million dollars per year, and that said proposed rates as applied to the fiscal years 1907, 1908 and 1909, would have had the effect as shown in the following statement:

(Here follows table of rates, marked page 22.)

23 Your orator further shows that the majority of rates on other commodities transported over the said railroad, due to competitive conditions over which your orator has no control, and due to the fact that your orator has the long-haul line in so many instances, are so fixed that it is impossible for your orator to raise said rates and keep the tonnage, which it is to the advantage of the receivership estate, as set forth above, to haul even at these low rates rather than to go without; that the facilities of your orator are at the present time taxed to the utmost making it impossible to transport any more lake-cargo coal from the No. 8 district than has been carried for the past two or three years, unless other tonnage is refused from other industries served by your orator; that all the rates in force on your orator's railroad bear a proper relation to each other and bear their just proportion of operating expenses, taking into consideration all the circumstances and conditions surrounding the transportation of the same; that your orator has no way to make up the loss of revenue incident to the proposed reduction in the lake-cargo rate, and the effect of a reduction in the lake cargo rate, with the resulting reduction to all other coal rates, will be to further reduce the income of the receivership estate, and by just that amount, to-wit: approximately \$500,000, prevent the said receivership estate from earning enough to pay the interest upon the funded debt of said the Wheeling & Lake Erie Railroad Company, which debt, in the aggregate, is far below the actual value of the property, and interest on the receiver's certificates issued as aforesaid, without giving any consideration whatever to the return to which the owners and holders of the capital stock of said company may be entitled by virtue of their respective holdings; that said proposed rate of 70 cents f. o. b. vessel Huron and Cleveland provided for in the order of the commission hereinbefore set forth in and of itself is unjust and unreasonable, and will be unremunerative; that the railroad constituting the receivership estate is being managed and operated in a careful and economic manner and with due regard to the rights of the shipping public and the owners of the property; and that the effect of said order of the Railroad Commission of Ohio, as applicable to the railroad constituting the receivership estate, will be to take the said property without due process of law and confiscate it for the benefit of the public without compensation to the owners or persons interested therein.

24

XIX.

Your orator further shows that the No. 8 district of Ohio is served not only by the railroad constituting the receivership estate, but by the railroads of the Baltimore & Ohio Railroad Company, the Cleveland, Lorain & Wheeling Railroad Company and the Pennsylvania Company; that all such railroad companies have lake ports on Lake Erie through which their lake-cargo coal from the mines on their railroads moves enroute to points in the Northwest outside of the state of Ohio; that such lake-cargo coal moving from the No. 8 district over the said other railroads constitutes approximately 75 per cent of the total lake-cargo tonnage moving from the No. 8 Ohio

District, leaving only 25 per cent to be transported over your orator's railroad; that the said Baltimore & Ohio, Cleveland, Lorain & Wheeling, and Pennsylvania companies have in force the same lake-cargo rates from the No. 8 district, except some of the companies to some lake ports quote a rate "f. o. b. dock" instead of "f. o. b. vessel" in which case the rate is 85 cents f. o. b. dock; that the order of the Railroad Commission of Ohio hereinafter referred to will not require such other railroads to change their respective lake-cargo rates on coal moving from the No. 8 district to lower Lake Erie ports enroute to the Northwest over their respective railroads; that a large number of the operators, members of the defendant Pittsburg Vein Operators' Association of Ohio, have mines located on said other railroads and engage in the lake-cargo trade, shipping the coal via such other railroads and vessels up the Great Lakes; that no complaint has been filed by the defendants herein or by any other person with the Railroad Commission of Ohio or the Inter-State Commerce Commission against said other railroads or any of them respecting their existing rates on lake-cargo coal, which are as above stated, nor has the Railroad Commission of Ohio on its own initiative instituted any such complaints against said other railroad companies; and that the effect of the enforcement of the order of the Railroad Commission of Ohio hereinafter referred to will be to work a discrimination against the property constituting the receivership estate, in that it will require your orator to transport lake cargo coal from the No. 8 District for less than the amount other railroads, engaging in the same business, in the same district, and under similar circumstances, are permitted under the law to charge, thereby depriving your orator of the property constituting the receivership estate without due process of law, and denying to said property the equal, full and just protection of the law.

25

XX.

Your orator further shows that on the 10th day of May, 1909, the Pittsburg Vein Operators' Association of Ohio filed a complaint with the Railroad Commission of Ohio against the Wheeling & Lake Erie Railroad Company, which was subsequently amended, alleging that the rate demanded, charged and collected by your orator upon coal transported from the mines located on and served by your orator's railroad in Jefferson and Harrison counties, Ohio, to the city of Cleveland and the village of Huron for shipment by vessel to various ports on the Great Lakes, to-wit: 85 cents per ton in car load lots f. o. b. Cleveland, and an additional charge of 5 cents per ton for transferring said coal from the railroad cars to lake vessels, was excessive, unjust and unreasonable per se and by comparison with other rates demanded, charged and collected by other railroads under similar conditions, and asking the Commission to investigate and to prohibit your orator from demanding charging and collecting said excessive, unjust and unreasonable rate and fixing what rate should be charged by your orator in lieu of said alleged unjust and unreasonable rate.

Your orator further shows that at no time has your orator main-

tained any such rate as that complained of in the amended complaint; that the rate which your orator has at all times maintained on lake-cargo coal is 90 cents f. o. b. vessel at Huron and Cleveland; that your orator answered said amended complaint alleging that he had in force on said railroad a rate upon coal transported over the line of said railroad to the city of Cleveland and to the village of Huron for re-shipment by vessel to points on the Great Lakes beyond the state of Ohio of 90 cents per ton in carload lots f. o. b. vessel at Cleveland and Huron and denying that said rates were excessive, unjust and unreasonable either in themselves or by comparison with other rates in force on your orator's railroad or other railroads under similar conditions.

Your orator further shows that the said complaint of the Pittsburgh Vein Operators' Association of Ohio against your orator and the Wheeling & Lake Erie Railroad Company came on for hearing before the Railroad Commission of Ohio and your orator protested against the jurisdiction of the said Commission, alleging that the rate on lake-cargo coal from the No. 8 District to Huron and Cleveland ports, to-wit: 90 cents f. o. b. vessels at said ports was a rate applicable only to inter-state commerce engaged in by the complain-

ants and your orator; that said Railroad Commission of Ohio
26 overruled your orator's objection to the jurisdiction of said Commission and proceeded to hear the complaint, and, after hearing the testimony, took the matter under consideration, and on the 28th day of February, 1910, made and entered an order, as follows:

"This matter came on for investigation upon the amended complaint of the Pittsburgh Vein Operators' Association of Ohio against the Wheeling & Lake Erie Railroad Company and B. A. Worthington, as receiver of the Wheeling & Lake Erie Railroad Company, alleging that the rate charged, demanded and collected by said defendants for the transportation of coal, carloads, from the mines in the Number Eight District located on the line of said railroad company to the village of Huron and the city of Cleveland, both in the state of Ohio, is excessive and unreasonable, the answer of said defendants thereto and the evidence. After hearing the evidence, argument of counsel and upon due consideration thereof, the Commission find that the rate of 90 cents per ton f. o. b. vessel, charged, demanded and collected by defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver of such railroad company for the transportation of coal, carloads, from the mines in Number Eight District located upon the line of such railroad in Ohio to the city of Cleveland and to the village of Huron, both located in Ohio, as shown by the tariff of the defendant railroad on file with the Railroad Commission of Ohio, is in each case excessive, unjust and unreasonable; and the Commission further find that a rate of 70 cents per ton f. o. b. vessel for the transportation of coal, carloads, by said defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver of such railroad company, or by either of them, from said Number Eight Dis-

trict to the village of Huron, Ohio, and the city of Cleveland, Ohio, is a reasonable and just charge for that service.

"It is therefore ordered that said defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver thereof, be and each of them is hereby notified and required to cease and desist from charging, demanding, collecting and receiving said excessive and unreasonable rate of 90 cents per ton f. o. b. vessel for the transportation of coal, carloads, from mines on the lines of said the Wheeling & Lake Erie Railroad Company in what is known as the Number Eight District in Ohio to the village of Huron, Ohio, and to the city of Cleveland, Ohio.

"It is further ordered that a rate of 70 cents per ton f. o. b. vessel, which the commission have found to be a just and reasonable rate to be charged for the transportation of coal, carloads, from said Number Eight District to the village of Huron, Ohio, and the city of Cleveland, Ohio, be substituted for said rate of 90 cents per ton f. o. b. vessel, found by the commission to be unreasonable, which rate of 70 cents per ton f. o. b. vessel, as aforesaid, shall be charged, imposed, observed and followed in the future by said the Wheeling & Lake Erie Railroad Company and said B. A. Worthington, receiver of said company, and by each of them in lieu of and in substitution of said rate of 90 cents per ton f. o. b. vessel, found by the Commission to be unreasonable."

A copy of which order and the Commission's opinion were served upon your orator herein on the 23rd day of March, 1910.

A copy of the amended complaint, amended answer and opinion of said Commission are hereto attached, marked respectively "Exhibits 1, 2 and 3" and to which your orator begs leave to refer and to have treated as a part of this his bill of complaint the same as if fully set out herein.

Your orator further shows that, by virtue of the statutes of the state of Ohio in such cases made and provided such order of the Railroad Commission of Ohio is a law of the state of Ohio, and of its own force, is effective and becomes operative thirty days after service of the same upon your orator, and that your orator thereafter, to-wit: in this instance the 22nd day of April, 1910, is required to observe and follow the provisions of said order in respect to the rate on lake cargo coal from the No. 8 district to the city of Cleveland f. o. b. vessel and the village of Huron f. o. b. vessel under penalty of enforcement by the Railroad Commission of Ohio in a criminal action, subjecting your orator and his officers and agents to heavy fine, and under further penalty of a civil action by the Pittsburg Vein Operators' Association of Ohio or the members thereof to recover three-fold damages alleged to have been sustained by reason of your orator's failure to comply with said order or by proceedings on behalf of the Railroad Commission of Ohio in mandamus, injunction or other appropriate civil remedies.

Your orator shows that the said order of the Railroad Commission of Ohio, dated February 28th, 1910, above set forth, by which your orator is required to put into effect a rate of 70 cents on lake-cargo coal from the No. 8 district f. o. b. vessel Huron and Cleveland in

carload lots, is void, because contrary to and in violation of the Constitution of the United States, in this, to-wit:

28 That said law directly affects and interferes with this interstate commerce engaged in by your orator, over which the said Railroad Commission of Ohio has no authority or power inasmuch as the regulation of such commerce is vested in the Federal government under the provisions of the Constitution of the United States.

Your orator further shows that said order of the Railroad Commission of Ohio, above referred to, is void because contrary to and in violation of the Constitution of the United States, in this, to-wit: That the said law deprives the owners and persons interested in the property constituting the receivership estate of their property without due process of law, denies to them the equal protection of the law, and takes private property for public purposes without due compensation.

Your orator further shows that said order of the Railroad Commission of Ohio is void, inasmuch as the findings of the said Commission are contrary to the facts and are not supported by the testimony offered by the parties at the time of the hearing before said Commission, and the said Commission, in its said findings of fact and conclusions of law, has failed to give due and proper consideration to the traffic conditions existing upon your orator's line of railroad. The said Commission has denied to your orator the right to recognize the effect of competition on rates, and has failed to distinguish between through and local rates. All as will appear from the testimony taken before said Commission which is tendered to the court for inspection upon the filing of this bill of complaint.

In Consideration Whereof, and inasmuch as your orator is without adequate remedy at law in the premises and can have adequate relief only in a court of equity, to the end that the defendants may answer the several matters hereinbefore set forth, and that this Court may decree that the said order of the Railroad Commission of Ohio above referred to, relating to the rate on lake-cargo coal, made February 28th, 1910, is null and void and of no effect as respects your orator.

Your Orator Prays that the Railroad Commission of Ohio and the Pittsburg Vein Operators' Association of Ohio and their respective officers, agents, attorneys, representatives and members, and the other defendants named in the bill of complaint, be perpetually enjoined, restrained and prohibited from instituting or authorizing or directing any suit, action or actions, of either a civil or criminal nature, or any proceedings, against your orator, the object or purpose of which or relief sought by said action being to put into effect

29 or to enforce any of the provisions of said order of the Railroad Commission of Ohio respecting the rate on lake-cargo coal, or to subject your orator to any penalties or forfeitures for failure to comply with said order under the statutes of Ohio, made and provided, and from in any manner interfering directly or indirectly, with the continuation of the present rate on lake-cargo coal from the No. 8 mines f. o. b. vessel Cleveland and Huron as

in effect on your orator's railroad at the present time, or such other rate or rates as your orator may from time to time put into effect; and that, upon final hearing said order of the Railroad Commission of Ohio may be by decree of this Court adjudged to be null and void.

And your orator prays that, in the meantime and during the pendency of this suit, the said order of the Railroad Commission of Ohio may be suspended and that the said Railroad Commission of Ohio and the Pittsburg Vein Operators' Association of Ohio, their respective officers, agents, attorneys, representatives, employes and members, and the other defendants named in this bill of complaint, and each and all of them be temporarily enjoined and restrained as herein prayed for.

And your orator prays for such other relief as the nature of the case may require and to which your orator may be entitled.

May it please your Honors to grant unto your orator a writ of subpoena, to be issued out of and under the seal of this honorable Court directed to the defendants, commanding said defendants and each of them to be and appear in this Court on a day certain, to be therein named, and to answer the premises, but not under oath, answer under oath being hereby waived, and to abide by and perform such decree as may be rendered herein.

And your orator will ever pray, etc.

B. A. WORTHINGTON,

Receiver of W. & L. E. R. R. Company, Complainant.

SQUIRE, SANDERS & DEMPSEY,

Solicitors for Complainant.

W. M. DUNCAN,

Of Counsel.

STATE OF OHIO,

Cuyahoga County, ss:

B. A. Worthington, being first duly sworn, says that he as receiver of The Wheeling & Lake Erie Railroad Company, is the complainant in the above-entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof that all the matters and things therein set forth are true except such as are stated to be upon information and belief, and, as to all such, he believes them to be true.

B. A. WORTHINGTON,

Sworn to and subscribed before me this 28th day of March, A. D. 1910.

[SEAL.]

CHARLES C. OWENS,

Notary Public.

EXHIBIT I.

Railroad Commission of Ohio.

No. 70.

THE PITTSBURG VEIN OPERATORS' ASSOCIATION OF OHIO,
Complainant,

vs.

THE WHEELING & LAKE ERIE RAILROAD COMPANY and B. A.
Worthington, Receiver of The Wheeling & Lake Erie Rail-
road Company, Defendants.*Amended Complaint.*

(Filed May 19, 1909.)

Complainant says:

I. That it is a voluntary association of operators in the No. 8 or Pittsburgh vein of coal in the State of Ohio, the members of which own, control and operate sixty-five (65) coal mines in said vein of coal in the State of Ohio, and produce and sell approximately nine million (9,000,000) tons of coal per year; that among the objects of said association is the protection of the rights of the members thereof and the promotion of their general welfare; and that the place of business of said association is at the Schworm Building in the City of Massillon, Ohio.

II. That the defendant railroad company is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and that the defendant B. A. Worthington, receiver of said company, is duly appointed, qualified and acting as such receiver by virtue of an appointment made by the United States Circuit Court for the Northern District of Ohio, Eastern Division, in the case of The National Car Wheel Company vs. The Wheeling & Lake Erie Railroad Company, consolidated with The Central Trust Company of New York, Trustee, vs. The Wheeling & Lake Erie Railroad Company, being cause No. 7359 in equity, consolidated with No. 7603.

III. That the said railroad company is the owner of a line of railroad located exclusively in the State of Ohio and prior to the appointment of said receiver operated said railroad and was a common carrier engaged in the transportation of persons and property by railroad between Martins Ferry, in the southern part of the
31 State of Ohio, and points on Lake Erie in the northern part of the State of Ohio, to-wit, among others, the city of Cleveland and the village of Huron in said state; that the defendant B. A. Worthington, receiver, has, ever since his appointment, and is now in possession and control of said property, and, as such receiver, is a common carrier and in the operation thereof is engaged in the transportation of persons and property over the lines of said

railroad within the State of Ohio; that there are approximately sixteen (16) coal mines owned and operated by the constituent members of your complainant and located on and served by said railroad and said receiver in Jefferson and Harrison counties, Ohio, from which mines coal is loaded and transported over the line of said railroad to various points in the State of Ohio; that approximately six thousand (6,000) tons are transported each year over said railroad to the city of Cleveland, and approximately four hundred and fifty thousand (450,000) tons each year over said railroad to the village of Huron, for shipment by vessel therefrom to various ports on the Great Lakes.

That the average distance from said mines, by said railroad, to said city of Cleveland is approximately one hundred and thirty-four miles (134) and to said village of Huron is approximately one hundred and fifty-five (155) miles; that the defendant receiver demands, charges and collects upon the coal so transported over said railroad from said mines to said city of Cleveland and said village of Huron, for shipment by vessel as aforesaid, eighty-five cents (85c) per ton in carload lots, F. O. B. Cleveland, and an additional charge of five cents (5c) per ton for transferring said coal from the railroad cars to lake vessels; that said rate so demanded, charged and collected by said receiver is not a part of a through rate; that said coal is billed and consigned to the shipper or consignor at said points-to-wit, Cleveland and Huron, and is by said receiver delivered at said points to the consignor or to his or its order and the said charges are paid to the defendant receiver by said consignor or shipper; that there is no common control, management or arrangement between the defendants and said vessels for a continuous carriage or shipment beyond said city of Cleveland and said village of Huron; that at the time said cars of coal are shipped from said mines to said points for shipment by vessel, the ultimate destination of said cars of coal is unknown to the consignor or shipper; that on the arrival of said cars of coal at said points of Cleveland and Huron, a portion of the same

32 are appropriated by said consignor or shipper to the fulfillment of the orders of his or its customers, as and when the same are needed for such purposes, and when so needed the same are delivered to said customers F. O. B. lake vessels at said points of Cleveland and Huron, that another portion of said cars of coal are put aboard lake vessels by said consignor or shipper and under a new and independent contract of carriage by the terms of which said lake vessels are to convey said coal from said consignor or shipper to various points on the Great Lakes; that another portion of said cars of coal are diverted at said points of Cleveland and Huron and there appropriated to other and local uses and purposes; that at the time said cars of coal are shipped from said mines to said points of Cleveland and Huron, it is not known by said consignor or shipper or by any other person or persons, or corporation, to which of the three general uses or purposes aforesaid said cars of coal will be appropriated.

IV. That the actual cost of said railroad and said receiver of transporting said coal in said carload lots from said mines of said

city of Cleveland and said village of Huron and there transferring the same to said vessels does not exceed the sum of thirty-five cents (35c) per ton; that a charge of fifty cents (50c) per ton by said railroad and said receiver for transporting and transferring said coal as aforesaid would produce for said railroad and said receiver a fair return or profit over and above the cost of the services rendered in transporting and transferring said coal as aforesaid; that said rate of eighty-five cents (85c) per ton for transporting said coal and five cents (5c) per ton for transferring said coal, so demanded, charged and collected by said defendant is therefore excessive, unjust and unreasonable per se and is excessive, unjust and unreasonable by comparison with rates demanded, charged and collected by this and other railroads under similar conditions.

Wherefore complainant prays that the defendants be required to answer the charges herein and that, after due hearing and investigation, an order be made commanding the defendants to cease and desist from said violation of the laws of Ohio herein complained of, and from demanding, charging and collecting said unjust and unreasonable rate; that it be determined and ordered herein what reasonable rate shall be charged by defendants in lieu of said unjust and unreasonable rate and that the Commission may make such further order as it may deem necessary in the premises.

33

THE PITTSBURG VEIN OPERATORS'
ASSOCIATION OF OHIO.

By F. M. OSBORNE, *President*.

And by:

EDWARD JOHNSON,

C. E. MAURER,

F. M. OSBORNE,

Committee.

Dated at the City of Cleveland, Ohio, this nineteenth day of May, 1909.

H. B. ARNOLD,

8 East Long Street, Columbus, Ohio;

T. H. HOGSETT,

American Trust Bldg., Cleveland, Ohio,

Counsel for Complainant.

The addresses of the defendants are as follows:

The Wheeling & Lake Erie Railroad Company, Perry-Payne Building, Cleveland, Ohio.

B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Perry-Payne Building, Cleveland, Ohio.

EXHIBIT 2.

Railroad Commission of Ohio.

No. 70.

THE PITTSBURG VEIN OPERATORS' ASSOCIATION OF OHIO,
Complainant,

vs.

THE WHEELING & LAKE ERIE RAILROAD COMPANY and B. A.
Worthington, Receiver of The Wheeling & Lake Erie Railroad
Company, Defendants.*Amended Answer to Amended Complaint.*

Now comes The Wheeling & Lake Erie Railroad Company by B. A. Worthington, its Receiver, and B. A. Worthington as Receiver of the Wheeling & Lake Erie Railroad Company, and, for amended answer to the amended complaint filed in the above entitled cause, say:

1. The defendants admit that the complainant is a voluntary association of operators in the No. 8 or Pittsburg Vein of coal in the State of Ohio; the members of which control and operate coal mines in said vein of coal; that the place of business of said Association is in the City of Massillon, Ohio, but, for want of information, deny all the other allegations contained in Article I of said complaint.

2. The defendants admit the allegations contained in Article II of said complaint.

34 3. The defendants admit that The Wheeling & Lake Erie Railroad Company is the owner of a line of railroad located exclusively in the State of Ohio; that the said B. A. Worthington, as Receiver, is now in possession and control of said property; and that said railroad company engaged, through its said Receiver in the transportation of persons and property over its said line of railroad within the State of Ohio; that there are approximately * * * coal mines located on and served by said railroad, from which coal is loaded and transported over said line of railroad to the village of Huron for reshipment by vessel therefrom to various points beyond the State of Ohio; admit that the Receiver charges and collects upon the coal so transported over said line of railroad to the city of Cleveland and village of Huron, for reshipment by vessel to points on the Great Lakes beyond the State of Ohio ninety cents per ton in carload lots f. o. b. vessels Cleveland and Huron. Defendants deny each, all and singular the other allegations contained in Article III, of said complaint, and particularly deny that the rates charged as aforesaid are excessive, unjust and unreasonable, either in themselves or by comparison with rates demanded, charged and collected by either this railroad or other railroads under similar conditions.

4. The defendants deny each and all of the allegations set forth in Article IV, of said complaint.

THE WHEELING & LAKE ERIE
RAILROAD COMPANY.

B. A. WORTHINGTON, *Receiver*.

B. A. WORTHINGTON.

*As Receiver of The Wheeling &
Lake Erie Railroad Company.*

EXHIBIT 3.

Railroad Commission of Ohio.

No. 70.

THE PITTSBURG VEIN OPERATORS' ASSOCIATION OF OHIO,
Complainant.

vs.

THE WHEELING & LAKE ERIE RAILROAD COMPANY and B. A.
Worthington, Receiver of The Wheeling & Lake Erie Railroad
Company, Defendants.

Complainant is an unincorporated association, composed of coal mine operators and coal mine operating companies, doing business as miners and shippers of coal, in what is known as the Number Eight District on the line of The Wheeling & Lake Erie Railroad Company. Complaint is filed against the Wheeling & Lake Erie Railroad Company and against its Receiver B. A. Worthington. The mines operated by complainant companies are located on The Wheeling & Lake Erie Railroad and subsidiary lines operated by it, and their territory is designated in defendants' tariff as the Number Eight District. The complaint is that the rate of 90c per ton F. O. B. vessel charged by defendant for the transportation of coal in car loads from the mines in Number Eight District to the village of Huron, and to the city of Cleveland, Ohio, is excessive and unreasonable.

Much evidence was introduced on both sides, which, so far as the Commission can perceive, is not material. Likewise, counsel on both sides in support of the theories indicated by such testimony, devoted considerable time to the argument of matters, which, in the opinion of the Commission were not pertinent. Complainant urged that the cost of producing coal as compared with competing fields is a matter that should be given much weight by the Commission, while defendants just as strenuously contended that the Commission should consider, as controlling, the financial effect upon the road of a reduction of the rate against which complaint is made. Both theories are misleading. The reasonableness or unreasonableness of the rate charged by defendants is the sole question before the Commission. If one producer is at a disadvantage as compared with a competing producer, so far as cost of production is concerned,

that is his misfortune; and while such producer is entitled to sympathy, he is not thereby entitled to an advantage in rate. If it were admitted that a carrier had a right to equalize differing natural conditions by preferential rates, a wide field for discrimination would be without regulation. One of the necessities for rate regulation is the existence of the evil arising from the assumption by carriers of authority to neutralize natural advantages on one hand, and to create artificial advantages on the other, by manipulation of rates. An extreme illustration would be the application of the principle to farm products; if one producer's land will produce only 10 bushels of wheat per acre, while his neighbor's land will produce 30, it would hardly be the province of the carrier to attempt to equalize those differing conditions by adjusting transportation rates and making such rates more favorable to the farmer whose land has the lesser producing qualities. Further if the transportation rate be unreasonable in itself, its continuance cannot be justified upon the theory that its reduction would impair, to an extent, the prosperity of the carrier. What then is to be considered in

36 determining the question at issue? How is the reasonableness of a transportation rate to be ascertained? Complainants contend that the cost of carriage is the controlling element to be considered, while defendants deny that it is possible to ascertain the cost of carriage of a particular commodity, and contend that even if it were ascertainable, it is not an important element in rate making; that rates are not now, and never were, made by carriers on a cost basis. In fact, the evidence and argument of defendants in this case tend to the conclusion that there is no basis upon which the reasonableness of a particular rate can be determined except it be, possibly in a very uncertain and indefinite way, by comparison with other rates.

The Commission is of the opinion that cost of carriage is a fundamental element in rate making; and that rates should be adjusted so as to yield revenue sufficient to pay operating expenses and a reasonable return on the investment. The railway world has not yet produced the man who could ascertain this cost with mathematical accuracy; but the management of a railway property can determine at the end of each year whether or not the earnings as a whole have been sufficient to yield a safe margin of profit, a narrow margin or no margin.

In addition to the consideration of rates as a whole, it is necessary to give attention to the relation of rates on different commodities, as it would be unjust to exact the same rate for transportation of pig iron as for the transportation of millinery. It has been long recognized that there should be a classification of freight as a basis of rates; and while the theoretical principles of such classification are well recognized, in practice these principles are more or less ignored. The transportation of heavy, low priced commodities costs less per ton mile than the transportation of light, bulky, high-priced commodities.

As a carrier is an insurer of property committed to its care, value must also be considered as an element in the insurance phase of

transportation; hence, everything else being equal the real value of the commodity transported justifies a higher or lower rate, as the case may be, according to the insurance hazard involved. It would be unjust and inequitable for a carrier to impose a higher charge on a heavy, cheap commodity than it imposes on a lighter, more bulky and more valuable commodity. If competitive conditions are such as to make it necessary for a carrier to transport a particular commodity at a rate lower than it would in the absence of competition, the carrier is not thereby justified in exacting rates

37 higher than would be just, on property transported where competition is absent, so as to make the revenue as a whole, adequately profitable. Such commodity should bear only its just proportion of the aggregate charge. To establish that the cost of transporting a large volume of a particular commodity when the movement is fairly regular, is approximately ascertainable, Mr. C. W. Hillman, an expert accountant, who had made an exhaustive investigation as to the cost of carrying coal by defendant's line from Number Eight District to Huron was called as a witness. Defendant had previously given Mr. Hillman access to its books and records, and from the facts there ascertained, in connection with the analysis of the evidence introduced in the case, Mr. Hillman made his estimate and gave in detail different factors considered by him in making allocations and final estimate of cost of carriage.

Mr. Hillman's testimony covered the whole field of operation, and his method of allocation of costs of operation between passenger and freight traffic appears practicable and reasonable and his conclusions very logical. From the analysis of Mr. Hillman's testimony and according to his conclusions, it costs 39.585 cents per ton, carload lots, to transport coal from Number Eight District to Huron. This estimate is corroborated by rates on defendant's road made for the transportation of coal and similar commodities under like conditions, and by comparison with rates on other roads, as well as by testimony and estimates of other witnesses.

Defendant's line is divided into operating divisions, the coal in question moving over division designated as "One" and "Two." In apportioning expenses between freight and passenger transportation, Mr. Hillman used various accounts, but the average of the whole was 83.4 per cent chargeable to freight. The fact that for the year ending June 30, 1909, the revenue derived from freight transportation was 88.7 per cent of the whole, Mr. Hillman's allotment seems somewhat low; but this — doubtless neutralized by the allotment to Divisions One and Two, which was 87 per cent of the expenses chargeable to freight, and his allotment of 51.37 per cent of this, to coal transportation, in view of the fact, that for the year ending June 30, 1909, bituminous coal tonnage was 46.74 per cent of the tonnage transported by The Wheeling & Lake Erie. Adding to Mr. Hillman's estimate of 39.585 cents per ton, the expense of transportation to Huron yards, 30 per cent for margin of profit, gives 51.46 cents per ton, to which add five cents for loading charge, gives 56.46

cents per ton as representing the rate to be charged on Number Eight coal, if a 70 per cent operating ratio is considered fair, and if all other traffic bears a relatively equal burden of transportation expense. But if we go further, and add 40 per cent instead of 30 per cent we have a total of 60.419 cents per ton, as a liberal charge from mines in Number Eight District to boats at Huron.

Another method may be adopted in arriving at a determination of what is a reasonable rate for this service; the testimony shows that the Pennsylvania Company receives 32.6 cents per ton for transportation of coal in earload lots received from the Norfolk & Western Railway at Columbus, from Columbus to Sandusky. The distance is 110 miles, and it is fair to assume that this rate is compensatory, if not profitable. Deducting five cents for loading charge at Sandusky, we have 27.6 cents as representing the transportation charge, which is $2\frac{1}{2}$ mills per ton per mile, and amounts to 38.75 cents per ton for 155 miles, the distance via The Wheeling & Lake Erie from Number Eight District to Huron. Adding five cents for initial terminal expense, we have 43.75 cents per ton, to which add 30 per cent for margin of profit, we have 56.875 cents per ton, as representing a fair rate to be charged on coal in earloads from Number Eight mines to Huron; add to this five cents per ton for loading into boats, making a total of 61.875 cents per ton from mines to boat. If, to be absolutely beyond question, we make our calculation to a 60 per cent operating ratio basis, our finding would be 66.25 cents as representing a liberally compensatory rate to be charged on coal in earloads to Huron f. o. b. vessel; that is to say, coal transported on this basis would be paying its full share of transportation expense based on a 60 per cent operating ratio.

We have no right to assume that a carrier will transport freight at non-compensatory rates; consequently, it is fair to assume that the 32.6 cents per ton rate, received by the Pennsylvania as compensation for hauling coal in earloads from Columbus to Sandusky, yields at least a margin of profit.

It is quite true that a carrier is justified in establishing rate proportions on a less per ton mile basis than it establishes on local rates; but what is the warrant therefor? The real justification for the decreased cost of such transportation arises from the elimination of terminal expense. The Pennsylvania receives the coal in question from the Norfolk & Western Railway at Columbus, usually in trainload lots, therefore the initial expense of the Pennsylvania is less than it would be if it had to collect this coal from the mines and consolidate and classify into trains; to that extent, and no more, is the Pennsylvania justified in charging a proportional rate less than a local rate, where initial expense is involved. The 85 cent rate on coal in earloads from Number Eight District to Huron, an average distance of 155 miles, yields an average revenue of 5.48 mills per ton mile. The evidence disclosed that the average coal train tonnage was between fifteen and sixteen hundred tons net. Using a conservative estimate of 1,400 tons per train, the average train mile revenue on coal from Number Eight

District to Huron would be \$7.67. The annual report of The Wheeling & Lake Erie Railroad for the year ending June 30, 1909, shows that the average freight train mile earnings of that road for the year was \$3.18, to which add 40 per cent to cover movement of empty equipment, and we have an average train mile revenue for loaded trains of \$4.45. This includes all classes of freight, high as well as low, long and short haul.

It is a long established practice and policy of carriers that low class freight be taxed proportionately less than the high class; that long hauls should pay less per ton mile and train mile, than short hauls; hence it follows that the average train mile revenue should be greater than the train mile revenue derived from the transportation of low class, long haul freight; yet here we have the anomaly of a long haul on freight of the lowest class, yielding more than the average on all commodities. Manifestly either the Number Eight coal is charged more than its fair proportion, or The Wheeling & Lake Erie Railroad is carrying a large amount of other freight at much less than a fair charge. But if all the freight carried by The Wheeling & Lake Erie Railroad has been charged on the same train mile basis, as Number Eight coal, the freight receipts for that year would have been \$8,167,517.34. Assuming that revenues from other sources to have been unchanged, the total revenues would have been \$8,940,495.22 and the operating ratio would have been only 47 per cent. No carrier is entitled to have a margin above expenses of 53 per cent. But even in such case, a rate producing a train mile revenue on Number Eight coal equal to the average train mile revenue on *Number Eight coal equal to the average train mile revenue would* be inequitable because the haul from Number Eight District to Huron and Cleveland, is much in excess of the average haul, and coal is entitled to the lowest basis of freight transportation rates. Thus it follows that coal transported in earloads from Number Eight District to Huron should be taxed at its fair proportion of operating expenses, less than the average per train mile rather than more.

40 The same reasoning applies to ton mile revenue. The Number Eight District-Huron rate, exclusive of vessel loading charge, yields 5.48 mills per ton mile. The average ton mile revenue of The Wheeling & Lake Erie Railroad for the year ending June 30, 1909, was 5.4 mills; this average, of course, includes all freight. It is well understood that small lot freight should pay very much more per ton mile than earload freight, because of the much greater economy of handling earload freight. Eighty thousand pounds of freight made up of four hundred shipments, of two hundred pounds each, will cost the carrier five times as much to handle as the same amount in one earload shipment. Again, freight hauled 25 miles will cost the carrier much more per ton mile, than that hauled 150 miles. So it seems inequitable that low class, long haul freight should yield a greater revenue per ton mile than the average of all freight. The fact that it does on The Wheeling & Lake Erie Railroad shows conclusively that something is wrong. Possibly the average per ton mile revenue is too low; and as a consequence the

total revenue derived from freight transportation is not adequate; but the fact that the total revenue does not bear the correct relation to the total cost, is no justification for the imposition on a particular movement or a particular commodity, more than its equal proportion, in the attempt to make up the deficit.

It was claimed by complainants that a reduction in the rate on coal from Number Eight District to the docks at Huron would naturally increase the tonnage. Defendants disputed this claim solely on the theory that a reduction in the Number Eight-Huron rate would be followed by a reduction in the West Virginia Lake Port rate, so as to prevent an increase in shipments from the Number Eight Field. Assuming, however, for the time, that the West Virginia Lake Port rates would not be reduced, it seems to follow that the Ohio mines would increase their output of cargo coal. The Wheeling & Lake Erie Railroad would benefit from this increase because the coal tonnage now handled over the Huron dock is much less than the capacity of the dock, and an increase would reduce the ton cost of dock handling.

The defendant maintains that it is not in position to take care of an increase in the coal traffic, because the volume of coal traffic now is nearly up to the capacity of The Wheeling & Lake Erie Railroad. This is really no answer at all, because a carrier is bound to provide facilities sufficient to meet the demand. If it were admitted that a

41 common carrier could arbitrarily limit the extent of its business, it would be admitting its power to prevent the development of the territory. It would further justify any rate a carrier might see fit to impose with a view of limiting the offerings of freight for transportation. In other words, a community of interests could, by the application in practice of this theory, injure incalculably a particular territory, while unduly stimulating a competing territory.

But beyond all this, The Wheeling & Lake Erie Railroad can take care of an increased tonnage from the Number Eight field to the Lake Ports without materially increasing its total tonnage, by simply advancing the unduly low rates and proportions which it has in effect, and which at present operate to reduce the average ton mile revenue. In fact, the increased lake coal traffic at a reduced rate, substituted for the very low rate freight now transported, will probably make the aggregate freight traffic revenue larger than at present, without greatly increasing the total tonnage.

We have found, by different methods of calculation amounts as representing the fair rates to be charged on coal in carloads from the Number Eight District to Huron Dock f. o. b. vessels, viz: 57, 61, 62 and 66 cents. To be absolutely certain that a sufficient sum has been allowed, giving the advantage of every doubt to the railroad company we are of the opinion that 70 cents per ton f. o. b. vessel would be ample to both the village of Huron and the city of Cleveland.

We therefore, find that the existing rate of 90 cents per ton imposed by The Wheeling & Lake Erie Railroad for the transportation of coal in carloads from Number Eight District to the village

of Huron and to the City of Cleveland f. o. b. vessel, is unjust and unreasonable and therefore unlawful.

An order will be issued accordingly.

(Endorsement:) 7691. Filed Mar. 28, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Subpoena.)

UNITED STATES OF AMERICA,

Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon Railroad Commission of Ohio; Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, its President and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray,

42 John Doe, et al., citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the

Circuit Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland on the first Monday in June next, to answer a certain Bill in Chancery, filed and exhibited in said Court against them by B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company, a citizen of and resident in the State of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of March, A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk*,

By A. H. ELLIOTT,

Deputy Clerk.

Memorandum.

The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of May, 1910, otherwise the said bill may be taken pro confesso.

B. C. MILLER, *Clerk*.

(Endorsement on Subpoena when issued:) 7961. United States Circuit Court, Northern District of Ohio. B. A. Worthington, Receiver, etc., vs. Railroad Commission of Ohio, et al. Appearance Day First Monday in May, 1910. Answer Day First Monday in June, 1910. Squire, Sanders & Dempsey, Complainant's Attorneys. \$50.00 deposited for costs for which the plaintiff may be liable in this suit. B. C. Miller, Clerk.

(Endorsement on Subpoena When Returned.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

U. S. Marshal's Return.

Received this writ at Cleveland, O., March 28, 1910, and on March 31, 1910, at the same place I served it on the within named, C. E. Maurer by delivering to him, personally, a true and certified copy hereof, with all endorsements thereon and at the same time I left with him a true and certified copy of the order to show cause, and Bill of Complaint, with all endorsements thereon; and on the within named, Wm. P. Murray by delivering to him personally, a true and certified copy hereof, with all endorsements thereon, and at the same time I left with him a true and certified copy of the Order to show cause, and Bill of Complaint, with all endorsements thereon; and on Frank M. Osborne by leaving at his usual place of residence with his daughter, Dorothy Osborne, an adult member of the family, a true and certified copy hereof, with all the endorsements thereon, and at the same time I left with her a true and certified copy of the Order to show cause and Bill of Complaint, with all endorsements thereon; and on J. J. Roby by leaving at his usual place of residence with his wife, Della M. Roby a true and certified copy hereof, with all endorsements thereon, and at the same time I left with her a true and certified copy of the Order to show cause and Bill of Complaint, with all endorsements thereon.

HYMAN D. DAVIS,

U. S. Marshal,

By HARRY T. BROCKMAN,

*Deputy.**Marshal's Fees.*

Service.....	8.00
Travel.....	.72
Service.....	8.00
Travel.....	.72
Service.....	8.00
	<hr/>
	\$25.44

Returned and Filed April 4, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Order of Service on Absent Defendants.)

February Term, A. D. 1910, to wit, March 28, 1910.

Present: Honorable Robert W. Tayler, U. S. District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver, etc.,

vs.

RAILROAD COMMISSION OF OHIO ET AL.

Upon application of the complainant herein for an order respecting service upon defendants not found in this district, it is hereby ordered that the Railroad Commission of Ohio, Howard M. Mannington, Secretary of the Pittsburg Vein Operators' Association of Ohio and Edward Johnson be and are hereby ordered and directed to appear, plead, answer or demur to the bill of complaint filed in the above entitled cause by June 6th, 1910.

(Order to Show Cause.)

February Term, A. D. 1910, to wit, March 28th, 1910.

Present: Honorable Robert W. Tayler, U. S. District Judge.

44

7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al.

This day, to-wit: the 28th day of March, 1910, this cause came on to be heard upon the verified bill of complaint of the complainant and upon the motion for temporary injunction as prayed for in the bill, and it is ordered that the defendants, and each of them, be required to appear before this court on the second day of April, 1910, at 9:30 a. m. or as soon thereafter as counsel can be heard and show cause why the said motion made should not be granted and a temporary restraining order issued.

(Certified Copy of Order for Service with Return.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

At a stated term of the Circuit Court of the United States, within and for the Eastern Division or the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in February, being the first day of said month, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth, to-wit: on Monday, the 28th day of March, A. D. 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

Among the proceedings then and there held were the following, to wit:

7961. In Equity.

B. A. WORTHINGTON, Receiver, etc.,
vs.

RAILROAD COMMISSION OF OHIO ET AL.

Upon application of the complainant herein for an order respecting service upon defendants not found in this district, it is hereby ordered that the railroad Commission of Ohio, Howard M. Manning, Secretary of the Pittsburgh Vein Operators' Association of Ohio and Edward Johnson, be and are hereby ordered and
45 directed to appear, plead, answer or demur to the bill of complaint filed in the above entitled cause by June 6th, 1910.

(TAYLER, Judge.)

THE UNITED STATES OF AMERICA, ss:

I, B. C. Miller, Clerk of the Circuit Court of the United States within and for the Northern District of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original order for service, entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is true, full and complete transcript and copy thereof.

Witness my official signature and the seal of said Court, at Cleveland in said District, this 28th day of March A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER, Clerk.

(Endorsement when Issued:) No. 7961. United States Circuit Court Northern District of Ohio, Eastern Division. B. A. Worthington, Receiver, etc., vs. Railroad Commission of Ohio, et al. Certified copy of Order for Service.

(Endorsement When Returned.)

U. S. Marshal's Return.

Received this writ at Cincinnati, Ohio, on March 29th, 1910, and on the same day I served the within named Railroad Commission of Ohio by handing a true copy of this writ, with the endorsement thereon, to Oliver P. Gothlin, a member of said Commission, personally, at Columbus, Ohio. And at the same time and in the same manner I served the said Railroad Commission of Ohio with a copy of Bill of Complaint in this cause.

And on March 30th, 1910, I served the within named Howard Mannington, Secretary of the *of the* Pittsburg Vein Operator's Association of Ohio, by handing to him personally a true copy of this writ, with the endorsement thereon, at Columbus, Ohio, and at the same time and in the same manner I served the within named Howard D. Mannington, Secretary as aforesaid, with a copy of Bill of Complaint in this cause.

And on March 30, 1910, I served the within named Edward Johnson by handing to him personally a true copy of this writ, with the endorsement thereon, at Columbus, Ohio. And at the same time, and in the same manner I served the said Edward Johnson with a copy of Bill of Complaint in this Cause.

EUGENE L. LEWIS,

U. S. Marshal, S. D. O.,

46

By ALBERT BAUER, *Deputy.**Fees.*

Mileage	\$.36
3 services, Order.....	6.00
3 services, Bill of Comp't.....	6.00
	<hr/>
	\$12.36

Returned and Filed Apr. 1, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Certified Copy of Order to Show Cause and Return.)

THE UNITED STATES OF AMERICA,

Northern District of Ohio, Eastern Division, ss:

At a Stated Term of the Circuit Court of the United States, Within and for the Eastern Division of the Northern District of Ohio, Begun and Held at the City of Cleveland, in said District, on the First Tuesday in February, Being the First Day of said month, in the Year of Our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States of America, the One Hundred and Thirty-fourth, to wit: on Monday, the 28th Day of March, A. D. 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

Among the Proceedings then and there had were the following, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

This day, to-wit: the 28th day of March, 1910, this cause came on to be heard upon the verified bill of complaint of the complainant and upon the motion for temporary injunction as prayed for in the bill, and it is ordered that the defendants, and each of them be required to appear before this court on the second day of April, 1910,

at 9:30 o'clock a. m. or as soon thereafter as counsel can be heard and show cause why the said motion made should not be granted and a temporary restraining order issued.

(TAYLER, J.)

THE UNITED STATES OF AMERICA, ss:

I, B. C. Miller, Clerk of the Circuit Court of the United States, within and for the Northern District of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original order to show cause entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term and on the

day therein named; and do further certify that the same is a full, true, and complete transcript and copy thereof.

Witness my official signature and the seal of said Court at Cleveland in said District this 28th day of March, A. D., 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk*.

(Endorsement when issued:) No. 7961. United States Circuit Court, Northern District of Ohio, Eastern Division. B. A. Worthington, Receiver etc. vs. Railroad Commission of Ohio, et al. Certified copy of Order to Show Cause.

(Endorsement When Returned.)

U. S. Marshal's Return.

Received this writ at Cincinnati, Ohio, on March 29th, 1910, and on March, 29th, I served the within named Railroad Commission of Ohio by handing a true copy of this writ, with the endorsement thereon, to Oliver P. Gothlin, a member of said Commission, at Columbus, Ohio.

And on March 30, 1910, I served the within named Pittsburg Vein Operators' Association of Ohio, by handing a true copy of this writ, with the endorsement thereon, to Howard D. Mannington, Secretary of said Association; no chief officer or higher representative of said Association found in this district upon whom to effect service.

And on March 30, 1910, I served the within named Edward Johnson by handing to him personally a true copy of this writ, with the endorsement thereon, at Columbus, Ohio.

The other within named defendants not found in this district.

EUGENE L. LEWIS,

U. S. Marshal, S. D. O.,

By ALBERT BAUER, *Deputy*.

48

Fees.

3 services	\$6.00
3 miles36
	<hr/>
	\$6.36

Returned and Filed April 1, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Hearing on Motion for Preliminary Injunction.)

February Term, A. D., 1910, to-wit, April 2nd, 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver,
vs.
RAILROAD COMMISSION OF OHIO et al.

This day this cause came on to be heard on the application of complainant for temporary restraining order and the pleas of defendant to jurisdiction, and was argued by counsel submitted to the Court and taken under advisement by the court.

(Plea to Jurisdiction.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
Railroad Company, Complainant

vs.
RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS'
Association of Ohio, Frank M. Osborne, Its President, and
Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward
Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Plea of Edward Johnson to the Jurisdiction of the Court.

Edward Johnson, one of the defendants in the above cause, specially appearing under protest, for the purpose of denying the jurisdiction of this court over his person, and for no other purpose, for this his special plea says; that it is not true that said Frank M. Osborne, the Pittsburg Vein Operators' Association of Ohio, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate on lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

This defendant, Edward Johnson, avers that all the preceding

matters alleged herein are true and pleads the same for the purpose of showing that this Court is without jurisdiction over him.

Wherefore insisting upon his exemption from suit in this court he says; that he is a resident and inhabitant of the City of Columbus, in the Eastern Division of the Southern Judicial District of Ohio, and that this Honorable Court is without jurisdiction in the premises.

T. H. HOGSETT,

Attorney for Edward Johnson.

STATE OF OHIO,

Cuyahoga County, ss:

T. H. Hogsett, being first duly sworn deposes on oath and says; that he is the attorney for Edward Johnson, defendant in the above cause; that said Edward Johnson is a non-resident of and is absent from the Northern District of Ohio, Eastern Division; that he has read the foregoing plea; that the same is true in point of fact and is not interposed for delay.

T. H. HOGSETT.

Sworn to before me by the said T. H. Hogsett and subscribed in my presence this 2nd day of April, A. D., 1910.

[SEAL.]

W. D. TURNER,

Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

T. H. HOGSETT.

Solicitor for Edward Johnson.

(Endorsement:) No. 7961. In Equity. B. A. Worthington, Receiver etc. Complainant, vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the U. S. for the Northern District of Ohio, Eastern Division. Plea of Edward Johnson to the Jurisdiction of the Court filed Apr. 2, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Plea to Jurisdiction.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

50

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Plea of Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, Its President; C. E. Maurer, J. J. Roby, and W. P. Murray.

Come now the Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, its President, C. E. Maurer, J. J. Roby and W. P. Murray, defendants in the above entitled suit, and joining themselves together for the purpose of this plea, and for no other purposes whatever, by protestation, not confessing or acknowledging all or any parts of the matters or things in the said Bill of Complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto and for plea say, that it is not true that said Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, its President, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate of lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

These pleading defendants aver that all of the preceding matters alleged herein are true, and plead the same to the said Bill of Complaint, and humbly pray the judgment of this Honorable Court whether they, or any of them, ought to be compelled to make any further or other answer to the said Bill of Complaint, and further pray to be hence dismissed with their costs and charges in that behalf most wrongfully sustained.

T. H. HOGSETT,

Solicitor for Defendants Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, Its President; C. E. Maurer, J. J. Roby, and W. P. Murray.

51

STATE OF OHIO,
Cuyahoga County, ss:

Frank M. Osborne, being first duly sworn, deposes and says that he is one of the defendants making the above plea; that he has read the foregoing plea to the Bill of Complaint; that the same is true in point of fact and is not interposed for purposes of delay.

F. M. OSBORNE.

Sworn to before me by the said Frank M. Osborne, and by him subscribed in my presence, this 2nd day of April, A. D., 1910.

[SEAL.]

W. D. TURNER,
Notary Public.

I certify that in my opinion the foregoing plea is well founded in point of law.

T. H. HOGSETT,
Counsel for Defendants Pittsburg Vein Operators' Association of Ohio; Frank M. Osborne, Its President; C. E. Maurer, J. J. Roby, and W. P. Murray.

(Endorsement on Plea to Jurisdiction of Pittsburg Vein Operators' Association of Ohio:) No. 7961. In Equity. B. A. Worthington etc., Complainant, vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the U. S. for the Northern District of Ohio, Eastern Division. Plea of Pittsburg Vein Operators' Association of Ohio, Frank M. Osborne, C. E. Maurer, J. J. Roby, W. P. Murray. Filed April 2, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Plea to Jurisdiction.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, PITTSBURG VEIN OPERATORS' Association of Ohio, Frank M. Osborne, Its President, and Howard M. Mannington, Its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants

52 Plea of Howard D. Mannington to the Jurisdiction of the Court.

Howard D. Mannington, made a defendant in the above case under the erroneous name of Howard M. Mannington, specially ap-

pearing under pretext for the purpose of denying the jurisdiction of this court over his person, and for no other purpose, for this his special plea, says; that it is not true that said Frank M. Osborne, the Pittsburg Vein Operators' Association of Ohio, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate on lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

This defendant, Howard D. Mannington, further says that it is not true that he is the Secretary of the Pittsburg Vein Operators' Association, or that he is an officer of or in any way connected with said association.

This defendant, Howard D. Mannington, avers that all the preceding matters alleged herein are true and pleads the same for the purpose of showing that this Court is without jurisdiction over him.

Wherefore insisting upon his exemption from suit in this court he says that he is a resident and inhabitant of the City of Columbus, in the Eastern Division of the Southern Judicial District of Ohio, and that this Honorable Court is without jurisdiction in the premises.

T. H. HOGSETT,

Attorney for Howard D. Mannington.

STATE OF OHIO,

Cuyahoga County, ss:

T. H. Hogsett, being first duly sworn deposes on oath and says; that he is the attorney for Howard D. Mannington, defendant in the above cause; that said Howard D. Mannington is a non-resident of and is absent from the Northern District of Ohio, Eastern Division; that he has read the foregoing plea; that the same is true in point of fact and is not interposed for delay.

T. H. HOGSETT,

Sworn to before me by the said T. H. Hogsett and by him subscribed in my presence this 2nd day of April, A. D., 1910.

[SEAL.]

W. D. TURNER,

Notary Public.

53 I hereby certify that in my opinion the foregoing plea is well founded in point of law.

T. H. HOGSETT,

Solicitor for Howard D. Mannington.

(Endorsement on Plea of Howard D. Mannington:) No. 7961. In Equity. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Plaintiff, vs. Railroad Commission of Ohio, et al. Defendant. In the Circuit Court of the United States for the

Northern District of Ohio, Eastern Division. Plea of Howard D. Mannington to the Jurisdiction of the Court. M. B. & H. H. Johnson, Cleveland, Ohio.

(Plea to Jurisdiction.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO; PITTSBURG VEIN OPERATORS' Association of Ohio; Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Plea of Railroad Commission of Ohio to the Jurisdiction of the Court.

The Railroad Commission of Ohio, one of the defendants in the above case, specially appearing under protest, for the purpose of denying the jurisdiction of this court over it, and for no other purpose, for this its special plea says; that it is not true that said Frank M. Osborne, the Pittsburg Vein Operators' Association of Ohio, or its officers or members, or Howard M. Mannington, or C. E. Maurer, or Edward Johnson, or J. J. Roby, or W. P. Murray, or any or all of them, have attempted to enforce against B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, a certain order of the Railroad Commission of Ohio, prescribing a rate on lake cargo coal, or to institute any civil action to recover three-fold damages by reason of the failure of said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, to comply with said order, all as alleged in said complaint.

This defendant, Railroad Commission of Ohio, avers that all the preceding matters alleged are true and pleads the same for the purpose of showing that this Court is without jurisdiction over it.

Wherefore insisting upon its exemption from suit in this court it says; that it is a resident and inhabitant of the City of Columbus, in the Eastern Division of the Southern Judicial District of Ohio, and that this Honorable Court is without jurisdiction in the premises.

U. G. DENMAN, *Att'y Gen'l*,
Attorney for Railroad Commission of Ohio.

T. H. HOGSETT,
FREEMAN T. EAGLESON.

STATE OF OHIO,

Cuyahoga County, ss:

— — —, being first duly sworn deposes on oath and says; that he is the attorney for the Railroad Commission of Ohio, defendant in the above cause, that said Railroad Commission of Ohio is a non-resident of and is absent from the Northern District of Ohio, Eastern Division; that he has read the foregoing plea; that the same is true in point of fact and is not interposed for delay.

Sworn to before me by the said — — — and by him subscribed in my presence this — day of April, A. D., 1910.

Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

U. G. DENMAN, *Att'y Gen'l.*

T. H. HOGSETT, AND

F. T. EAGLESON,

Attorneys for Railroad Commission of Ohio.

(Endorsement on Plea of Railroad Commission of Ohio to Jurisdiction:) No. 7961. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Plaintiff, vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. Plea of Railroad Commission of Ohio, to the jurisdiction of the Court. Filed April 2, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O., M. B. & H. H. Johnson.

55 (Order Dismissing Bill of Complaint as to All Defendants
Except Railroad Commission of Ohio.)

April Term, A. D. 1910, to wit, June 25th, 1910.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,

vs.

RAILROAD COMMISSION OF OHIO et al.

Present: Honorable Robert W. Tayler, United States District Judge.

In this cause, by consent of parties, it is this day ordered by the Court that the bill of complaint be and the same is hereby dismissed without prejudice to complainant as to all the defendants named therein except Railroad Commission of Ohio.

(Leave to File Answer.)

April Term, A. D., 1910, to-wit; June 25th, 1910.

Present: Honorable Robert W. Tayler, United States District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company,
vs.
RAILROAD COMMISSION OF OHIO et al.

In this cause on application of defendant, Railroad Commission of Ohio, leave is granted it to file its answer herein instantler, and said answer is accordingly filed.

Answer.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,
vs.
RAILROAD COMMISSION OF OHIO; PITTSBURG VEIN OPERATORS' Association of Ohio; Frank M. Osborne, its President, and Howard M. Mannington, its Secretary, and C. E. Maurer, Edward Johnson, J. J. Roby, W. P. Murray, John Doe, et al., Defendants.

Answer of the Above-named Defendant, The Railroad Commission of Ohio, to the Bill of Complaint of the Above-named Plaintiff, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company.

56 For answer to said bill of Railroad Commission of Ohio, says:

1. That it admits that it is a body created and organized under and pursuant to the laws of the State of Ohio, with capacity to be sued under such name; that it acts pursuant to power and authority vested in it by the Legislature of the State of Ohio; that it is authorized to keep its office in the capital of the State of Ohio, to-wit: Columbus and to hold sessions at any other place in the State which convenience may require; that the Pittsburg Vein Operators' Association of Ohio is a voluntary association of persons and corporations owning, controlling or operating coal mines in the No. 8 Ohio coal district, situated in Jefferson, Harrison and Belmont Counties, Ohio,

and that the headquarters of said association is in the City of Massillon, Ohio; that complainant, B. A. Worthington, is the duly appointed qualified and acting Receiver of all the property, rights and franchises of The Wheeling & Lake Erie Railroad Company, as alleged in Part I of said bill of complaint; but that this defendant is not informed as to the truth of the other allegations set out in Part I of said bill of complaint, and for that reason denies that the same are true and asks that complainant be put to his proof.

2. That it admits that this is a civil action and that the amount in controversy exceeds, exclusive of interest and costs, the sum of Five Thousand Dollars (\$5,000.00); admits that complainant, in the management of the Railroad of which he is Receiver, and in the charging and enforcing of said lake cargo coal rate, is under the direction and control of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, which said court appointed said complainant Receiver of said railroad; and admits that this defendant will attempt, pursuant to authority vested in it by virtue of the statutes of the State of Ohio, to enforce a certain order made by this defendant and set out in Part XX of said bill of complaint, which said order prescribed a rate for the transportation of said lake cargo coal from said mines in the Counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to the ports of Huron and Cleveland, both of which are in the State of Ohio; and this defendant denies all the allegations of Part II of said bill of complaint not hereinbefore admitted to be true.

3. That this defendant admits that the property, over which complainant was appointed Receiver, consists of a single track
57 Railroad extending from Toledo, Ohio, to Steubenville and Martins Ferry on the Ohio River, and from Adena to St. Clairsville, and from Huron, on Lake Erie, to Norwalk Junction; from Cleveland to Zanesville, from Canton to Sherrodsville, and various small branches extending therefrom, but says that as to the number of miles and the names of divisions thereof it is not informed.

4. That this defendant is not informed as to the amount of the capital stock, funded debt, equipment obligations, receivership certificates, or as to the correctness of any other fact or facts set out in Part IV of said bill of complaint, and for this reason denies that the same is true, and asks that said complainant be put to his proof with respect thereto.

5. That this defendant is not informed with respect to the matters alleged in Part V of said bill of complaint, and has not sufficient information on which to base a belief, and therefore denies that the same are true, and asks that complainant be put to his proof, though this defendant admits that said B. A. Worthington is and since the month of June, A. D., 1908, has been the duly appointed, qualified and acting Receiver of the property of said The Wheeling and Lake Erie Railroad Company.

6. That this defendant admits that three of the coal producing districts served by The Wheeling and Lake Erie Railroad are the so-called Massillon District, Middle District and No. 8 Ohio District,

and that the Pittsburg Vein Operators' Association is an organization whose constituent members are interested in mining operations in said No. 8 Ohio District admits that said complainant, as Receiver, has classified coal for tariff purposes as railway fuel coal, lake cargo coal and commercial coal; but says that it is not informed as to the other matters of fact alleged in Part VI of said bill of complaint, and therefore denies that the same are true, and asks that complainant be put to his proof.

7. That this defendant is not informed as to the matters set out in Part VII of said bill of complaint, and for this reason denies that the same are true, and asks that complainant be put to his proof.

8. That this defendant admits that at the time of the filing of said complaint before this defendant, the Railroad Commission of Ohio, by the Pittsburg Vein Operators' Association of Ohio, and since that time said complainant has had in effect a rate of Ninety Cents (90 cents) per ton f. o. b. vessel on so-called lake cargo coal; but that this defendant denies all and singular the other allegations made in Part VIII of said bill of complaint, in the manner

58 and form therein alleged, and says that the facts concerning and relating to the production, transportation and sale of said No. 8 lake coal are as follows:

That said number 8 lake coal is mined and produced by said No. 8 operators at the same time and in connection with said railroad fuel coal and said commercial coal, and that all three classes or kinds of said coals are loaded at said mines in cars furnished by said The Wheeling and Lake Erie Railroad Company; that when it has been determined by said shippers to assign any of the various cars of coal mined and loaded at said mines, for the purpose of lake shipment, said cars so selected and assigned are billed to Huron or Cleveland on the line of The Wheeling & Lake Erie Railroad Company to the order of said shippers or to the order of some person or persons employed by or acting for said shippers, the names of various persons frequently being used as the nominal consignee for the purpose of distinguishing between the different classes of coal contained in said cars; that on the arrival of said cars of coal at said points of Huron and Cleveland, said cars are placed in the yards of said The Wheeling and Lake Erie Railroad Company at those points to await the orders of said shippers; that when sufficient cars have accumulated in said yards with which to load a lake vessel, and when said lake vessel has been procured by said shippers, said shippers then direct said railroad company to take certain of said cars of coal from said yards and unload or transfer the contents of the same to said vessel, or the contents of so many of said cars as may be necessary to load said vessel to its capacity; that the contents of said cars of coal are transferred to said vessel by said railroad only as and when directed by said shippers.

That the arrangements for the carrying of said coal by said vessel are made by said shippers for and in their own behalf, or for and in behalf of the purchasers or prospective purchasers of said coal; that said arrangements are entirely independent of and disconnected from the contract or agreement made by said shippers with the

Wheeling and Lake Erie Railroad Company, and its Receiver, for the carriage of said coal from said mines to the lake front; and that said The Wheeling and Lake Erie Railroad Company, and its said Receiver, have nothing whatever to do with said arrangements between said shippers and said lake carrier, and do not even have knowledge of the terms of said arrangements or the name of the transportation company or of the vessel which is to convey said coal from said lake ports, until said The Wheeling and Lake Erie Railroad Company, or its Receiver, is notified by said shippers to

59 load a certain named vessel on a certain fixed date with cars of coal from a certain designated class of shipments, and that said contracts with said vessel-owners are made sometimes before and sometimes after said lake coal is shipped to said ports of Huron and Cleveland.

That the contracts for the sale of said No. 8 lake coal, and the sales of the said No. 8 lake coal, are made by said shippers in the following manner: (1) Contracts for the sale of large quantities of said coal, at a certain price per ton, are frequently made a long time before the coal to be supplied under said contract has been mined; that by the terms of some of said contracts the obligations of said shippers cease when said coal is delivered f. o. b. vessel at said lake ports of Huron and Cleveland, and that title to and risk in said coal after delivery on board said vessel are to be and are in said purchasers, and that said purchasers effect insurance on the cargo of coal so loaded to protect said purchasers during the lake voyage; that by the terms of other of said contracts of sale the obligations of said shippers are to deliver certain coals at a certain rate per ton, at various points on the Great Lakes other than said points of Huron and Cleveland. (2) Contracts for the sale of cargoes of said lake coal are frequently made and said cargo loaded from cars of coal standing at said ports of Huron and Cleveland when said contract of sale is made, though said sale or contract of sale was not even anticipated or contemplated at the time when said cars appropriated to said contract of sale were shipped from the mines, or when they arrived at Huron or Cleveland.

That said shippers frequently lend coal belonging to them and standing in said cars in said yards of said railroad company at Huron and Cleveland to each other, so as to enable the borrowing shipper to obtain sufficient coal with which to load a vessel when said borrowing shipper may happen to need the same.

That said shippers send large quantities of coal from their said mines to said ports of Huron and Cleveland to be used as fuel coal by said vessels carrying said lake cargo coal.

That of the coal started by said shippers from their said mines to the lake front at Huron and Cleveland, thousands of tons are annually diverted en route and appropriated to other uses.

That at the time when said cars of lake coal are started towards said lake ports of Huron and Cleveland by said shippers billed and consigned as aforesaid, it is not known to said shippers, or to said railroad or to said Receiver, or to any other person or corporation, which car or cars, if any, will be diverted to uses other

60 than lake cargo shipments, and that it is not known to whom

said car or cars, or train of said coal will be shipped after the same shall have reached the lake front, or on what vessel the same will be loaded for lake carriage, or whether the same shall be delivered to some purchaser, f. o. b. vessel or ultimately delivered to some purchaser at the upper lake ports.

That no specific appropriation of any of said coal is made to any particular purpose, or to any particular consignee until after the arrival of said coal at said ports of Huron and Cleveland, except in the cases in which said coal is diverted en route, but that the exclusive control of, and the general title to this undivided and unappropriated mass of property remains in said shippers, and that in no case is there an appropriation of any specific part of this mass of coal to the fulfillment of any of said contracts for the sale of said lake coal until said coal is finally deposited in said vessel in said ports of Huron and Cleveland.

That the movement of said coal from the mines of said shippers and the detention of the same in the yards at Huron and Cleveland, all of which is necessary to the proper and economic handling of said coal, and all of which is done without any intent or purpose to break up the continuity of any carriage of said coal, which would otherwise be a through carriage or shipment, is a part of a general preliminary step by the shippers which embraces the collection and assembling of a large mass of their said coal at said ports of Huron and Cleveland preparatory to appropriating different parts thereof to the various uses aforesaid; that said appropriation of said lake cargo coal to said various purchasers pursuant to said contracts of sale, is first made when said coal is properly placed in the hold of said vessels, and that a new and independent carriage of said lake coal begins after the delivery of said coal in the hold of said vessels, at which time the shipment of any defined or specified mass of said coal to any consignee beyond the State of Ohio first begins.

That after said lake coal has been delivered by said railroad, or said Receiver, to said shippers or consignees on board said vessels, said shippers or consignees may, without the consent of said railroad, and without violating or varying any part of said contract of carriage between said shippers and said railroad, cause said cargoes of coal to be transported to any point on the Great Lakes in the State of Ohio or in any other State.

61 9. That this defendant admits that in properly unloading said lake cargo coal from cars and putting the same into the holds of vessels, it is necessary and customary for complainant to have said coal properly trimmed or distributed in the holds of said vessels; but that this defendant denies each and every allegation of fact in Part IX of said bill of complaint not herein admitted to be true.

10. That this defendant admits that there is in Western Pennsylvania a coal producing district known as the Pittsburgh District; admits that a part of the coal produced in said Pittsburgh District is shipped to the port of Huron Ohio, via Wabash, Pittsburgh Terminal, West Side Belt, and Wheeling and Lake Erie Railroads; admits that the rate on so-called lake cargo coal from said Pittsburgh District

to said lower lake ports, including Huron, is Three Cents (3 cents) per ton higher than the rate on lake cargo coal from said No. 8 Ohio District; admits that a large portion of the coal moving over the Wheeling and Lake Erie Railroad of which complainant is Receiver, is not included in said lake cargo trade and moves to points outside of the State of Ohio; but this defendant denies the other averments contained in Part X of said bill of complaint.

11. That this defendant is not informed as to the correctness of the statements contained in Part XI of said bill of complaint, and therefore denies that the same are true, and asks that complainant be put to his proof.

12. That this defendant is not informed as to the correctness of the statements contained in Part XII of said bill of complaint, and therefore denies that the same are true and asks that complainant be put to his proof.

13. That this defendant admits that by the Interstate Commerce Commission classification operating expenses are classified under the five heads named in Part XIII of said bill; but that this defendant denies the other allegations of fact contained in said part XIII of said bill of complaint.

14. That this defendant admits that the Railroad constituting the receivership estate is used for transportation of commodities moving from points within to points without the State of Ohio, as well as commodities moving between points within the State of Ohio, as stated in Part XIV of said bill of complaint; but that as to the other matters set out in said Part XIV of said bill of complaint, this defendant is not informed, and therefore denies the same to be true, and asks that complainant be put to his proof.

62 15. That this defendant is not informed as to whether or not the tabular statement constituting part XV of the bill of complaint is correct, and therefore denies that the same is true, and asks that complainant be put to his proof.

16. That this defendant is not informed as to the correctness of the statements contained in Part XVI of said bill of complaint, and therefore denies that the same are true, and asks that complainant be put to his proof.

17. This defendant is not informed as to the correctness of the statements contained in Part XVII of said bill of complaint, and therefore denies that the same are true and asks that complainant be put to his proof.

18. That this defendant denies all and singular the averments contained in Part XVIII of said bill of complaint.

19. That this defendant admits that said No. 8 Ohio District is served by the Baltimore and Ohio Railroad, the Cleveland, Lorain and Wheeling Railroad and Pennsylvania Railroad, as well as the Wheeling & Lake Erie Railroad; admits that the rates in force for transporting coal from said No. 8 Ohio District to said lower Lake ports are at present and for some time past have been, in substance, the same on all said railroads, and admits that no complaint has, as to the No. 8 lake coal rate, up to the present time been filed with said Railroad Commission of Ohio against any of said railroads other

than said Wheeling and Lake Erie Railroad; but this defendant denies the other averments contained in Part XIX of said bill of complaint.

20. That this defendant admits that said the Pittsburg Vein Operators' Association of Ohio filed a complaint and an amended complaint with the Railroad Commission of Ohio against The Wheeling and Lake Erie Railroad Company and B. A. Worthington, Receiver thereof, alleging that the rate charged for the transportation of No. 8 lake coal was unjust and unreasonable; admits that said The Wheeling and Lake Erie Railroad Company and B. A. Worthington, Receiver thereof filed an answer and an amended answer to said complaint with the Railroad Commission of Ohio; admits that said complaint came on for hearing and that at said hearing The Wheeling and Lake Erie Railroad Company and said B. A. Worthington, Receiver thereof, protested against the jurisdiction of said Commission and that said protest was overruled; admits that on the 28th day of February, 1910, said the Railroad Commission of Ohio made and entered an order as set out in Part XX of the Bill of complaint herein, and that a copy of said order was served on complainant herein and on The Wheeling and Lake Erie Railroad Company on March 23rd, 1910, but this defendant says that prior to said 23rd day of March, 1910, to-wit, on the — day of —, 1910, a copy of said order made and entered by said Railroad Commission of Ohio was mailed to one William M. Duncan, a director of said The Wheeling and Lake Erie Railroad Company and counsel for said railroad company and counsel for B. A. Worthington, Receiver of said Railroad Company; admits that the Statutes of Ohio impose a penalty on any railroad company which refuses to obey any lawful requirement or order of the Railroad Commission not enjoined or vacated by a court of competent jurisdiction, and provide that said Railroad Commission may compel compliance with its legal and subsisting orders by proceedings in mandamus, injunction or by other appropriate civil remedies, and provide that any railroad doing or permitting to be done anything prohibited or declared to be unlawful by said Railroad Commission Act, shall be liable in treble damages to the party injured by the doing of such unlawful acts, but this defendant says that by the Statutes of Ohio made and provided said finding and said order of said Railroad Commission are not final, and that said complainant in this case was and is by said Statutes allowed the right at any time within sixty (60) days after said order was given to commence an action in a Court of Common Pleas, against said Railroad Commission to vacate and set aside said order on the grounds that the rate fixed in said order is unlawful and unreasonable, and that if said Court of Common Pleas shall sustain said order of said Railroad Commission said complainant has the further right under said Statutes of the State of Ohio at any time within sixty (60) days after service of a copy of the order or judgment of said Court of Common Pleas to appeal or take said case up on error to the higher courts of the State of Ohio in the same manner as in other civil actions, and that said complainant has commenced an action in the Court of Common Pleas of Franklin

County against said Railroad Commission of Ohio, praying said Court of Common Pleas to vacate and set aside said order of said Railroad Commission of Ohio, said cause being number 59005 in the Court of Common Pleas of Franklin County, State of Ohio.

Further answering this defendant denies each and every allegation of fact contained in Part XX of said bill of complaint not herein admitted to be true.

Wherefore, having fully answered all of the averments and allegations in said bill of complaint contained, this defendant prays
64 that said bill may be dismissed and that defendant may go hence without day, and that it may have and recover its costs and disbursements herein.

RAILROAD COMMISSION OF OHIO.

By U. G. DENMAN, *Attorney General*.

THOS. H. HOGSETT,

FREEMAN T. EAGLESON,

Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, etc., Plaintiff vs. Railroad Commission of Ohio, et al., Defendant. In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, in Equity. Answer of the above named defendant the Railroad Commission of Ohio to the Bill of Complaint of the above named plaintiff B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company. M. B. & H. H. Johnson, Cleveland. Filed June 25, 1910. B. C. Miller, Clerk U. S. Circuit Court, N. D. O.

(Replication.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO et al., Defendants.

Replication.

This replicant, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, saving and reserving to himself all and all manner of advantages and objections which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Railroad Commission of Ohio, for replication thereunto saith that he doth and will aver, maintain and prove the said bill of complaint to be true, certain and sufficient in the law to be answered thereunto by the said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in law

to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby *now* and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct; and humbly prays as in and by said bill of complaint he hath already prayed.

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SQUIRE, SANDERS & DEMPSEY,

Solicitors for Replicant, B. A. Worthington, Receiver.

W. M. DUNCAN,

Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Plaintiff vs. Railroad Commission of Ohio, Defendant. Replication. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. Squire, Sanders & Dempsey.

(Testimony.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO et al., Defendants.

:

Testimony.

Testimony in the Above Entitled Cause Taken Before and Written Out by B. C. Miller, Clerk, in Open Court, under the 67th Rule in Equity as Amended and Pursuant to the Order of the Court, at the Final Hearing of said Cause Before the Honorable Robert W. Tayler, Judge of said Court, on the 25th Day of June, A. D. 1910.

Appearances:

For Complainant, Squire, Sanders & Dempsey, by W. M. Duncan.

For Defendant, U. G. Denman, Attorney-General of Ohio, by Freeman T. Lagleson, T. H. Hogsett.

Stipulation.

It is hereby stipulated and agreed between counsel for complainant and counsel for defendant, by and with consent of the court, that each party to this cause may offer as evidence in this case

extracts from the testimony in a certain hearing held before the Railroad Commission of Ohio, in which the Pittsburg Vein Operators' Association of Ohio were complainants and The Wheeling and Lake Erie Railroad Company and B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, were defendants.

66 Thereupon complainant, to maintain the issues on its part offered the following extracts from the testimony before said Railroad Commission of Ohio in evidence.

G. W. RISTINE, formerly assistant freight traffic manager for the Erie Railroad, offered as a witness by the Coal Operators in the proceeding before the Ohio Railroad Commission.

On direct examination witness testified as follows:

(R. 1564).

Mr. Ristine: The rail proportion of eighty-five cents to me looks unreasonable for two reasons, first, there is not sufficient differential with other fields taking into consideration the extra cost of mining which the railroad ought to always consider, and also the quality of the coal, and second, I cannot draw any particular distinction between coal delivered to a railroad and coal delivered to a vessel, both of which is destined to some foreign destination.

On cross-examination witness testified as follows:

(R. 1575).

Mr. Duncan: Now in considering this rate you have considered it, or you have considered the transportation of the coal from the Number Eight District through the Huron gateway as coal that is not destined for Huron but for points beyond, have you not?

Mr. Ristine: Sure.

Mr. Duncan: In other words, you have not treated this coal as local at Huron?

Mr. Ristine: No. Local coal at Huron would be commercial coal.

Mr. Duncan: In other words, in your conclusions you have treated this coal as coal moving from Ohio through the Huron gateway to points in the north-west and states beyond?

Mr. Ristine: You mean somewhere beyond. It may not go to the north-west states.

Mr. Duncan: It goes beyond Huron?

Mr. Ristine: It goes beyond Huron undoubtedly—the lake coal.

Mr. Duncan: They don't load coal into the holds of vessels to keep at Huron, do they?

Mr. Ristine: No, I guess not; I think not.

Mr. Duncan: So that your conclusion is based upon the assumption that this rate should be treated in precisely the same manner that a railroad company treats their proportional rates on other business?

Mr. Ristine: The same as they do on the Railway Fuel.

67 Mr. A. S. DODGE, witness offered by the coal operators,
formerly vice-president and in charge of traffic on the C. &
E. I.

On cross-examination witness testified as follows:

(R. 1502, 1503, 1519.)

Mr. Duncan: And therefore, in your answers and the conclusion which you have reached respecting this lake cargo rate you have treated the commerce as interstate commerce rather than state commerce?

Mr. Hogsett: We object to the question.

Commissioner Hughes: Answer the question.

Mr. Dodge: I could not lose sight of the fact that the ultimate destination of the coal was interstate.

Mr. Duncan: Did you take into consideration the conditions in the consuming markets at the head of the lakes?

Mr. Dodge: Final destination?

Mr. Duncan: Yes.

Mr. Dodge: No

Mr. EDWARD JOHNSON, witness offered by Coal Operators, coal operator situated at Columbus.

On cross-examination, witness testified as follows:

(R. 1075, 1074.)

Mr. Johnson: I have simply an interest—small amount of stock in the Northwestern Fuel Company; not enough to cut any figure though.

Mr. Duncan: That is the company to which the Lorain Coal & Dock Company consigns its cargo fuel?

Mr. Johnson: Some of it—part of it.

Mr. Duncan: I mean its cargo coal?

Mr. Johnson: We sell to the Northwestern Fuel Company just as any other company does. We have no other arrangements.

Mr. Duncan: Are you interested in the Fairmont field?

Mr. Johnson: No, sir.

Mr. Duncan: Is the Northwestern Fuel Company interested in the Fairmont field?

Mr. Johnson: I think so.

Mr. Duncan: So that it buys its coal from this Fairmont Company in which it is interested, as well as your Company?

Mr. Johnson: Yes, sir.

Mr. Duncan: Taking the number eight coal and the Fairmont coal up the lakes to this dock in the northwest?

Mr. Johnson: Yes, sir.

Mr. Duncan: Where is the dock of the Northwestern Fuel Company located?

Mr. Johnson: Oh, they have docks at different places.

68 Mr. Duncan: Well, name the places?

Mr. Johnson: Duluth, Green Bay—I hardly know where the docks are.

Mr. Woodford: Washburn probably.

Mr. Johnson: Washburn. These gentlemen know more about that than I do.

Mr. Duncan: Is your company sending coal up the lakes to any other source than the Northwestern Fuel Company this year?

Mr. Johnson: Yes, sir.

Mr. Duncan: What other coal?

Mr. Johnson: We are selling to the Central Coal Company.

Mr. Duncan: Is that affiliated with the Northwestern Fuel Company?

Mr. Johnson: No, sir.

Mr. Duncan: What other company do you sell to?

Mr. Johnson: Occasionally where we can sell a cargo of coal scattered through the district; I don't know particularly but no contracts with anybody other than those two.

Mr. Duncan: But your contracts for this season are for coal to be delivered to the Central—

Mr. Johnson: Central Coal Company.

Mr. Duncan: The Central Coal Company, the Northwestern Fuel Company, whose docks are on Lake Superior somewhere up in the northwest, and in addition to that, you probably will sell a little additional coal to stray purchasers?

Mr. Johnson: Anybody that wants to buy it, yes, sir.

Mr. Duncan: That constitutes your lake coal trade for this season or will constitute it?

Mr. Johnson: Yes.

Mr. W. R. Woodford, witness offered by Coal Operators: Upon cross-examination witness testified as follows:

(R. 1125).

Mr. Duncan: Now, I am interested in your statement as to the effect that the rates on the Wheeling & Lake Erie and other railroads had upon the rates you could get for your coal on the C. L. & W. Why should the rates on those railroads have any effect upon the rate on your road?

Mr. Woodford: The rates on their—or their coal and our coal went to common markets. We couldn't get any more money for our coal than they got for theirs.

Mr. Duncan: And unless you put the coal at Lake ports for shipment to the northwest at the same rates they were putting it up over the Wheeling & Lake Erie and other railroads you could not get any Lake traffic at all?

Mr. Woodford: We are not getting a large traffic. We could get some possibly.

Mr. J. J. Roby, witness offered by Coal Operators: On cross-examination witness testified as follows:

(R. 954, 955 and 956.)

Mr. Duncan: Do you ship coal to the northwest?

Mr. Roby: Do you mean lake coal?

Mr. Duncan: Yes.

Mr. Roby: Last year we shipped about 130,000 tons.

Mr. Roby: But our lake coal was sold to a party who has docks at various points on the lakes.

Mr. Duncan: Who is the party?

Mr. Roby: The C. Reiss Coal Company.

Mr. Duncan: Who is the C. Reiss Coal Company; is Mr. Somers interested in it?

Mr. Roby: No, sir.

Mr. Duncan: Any of the members of your company interested in it?

Mr. Roby: No, sir.

Mr. Duncan: Does the C. Reiss Coal Company take all of your tonnage?

Mr. Roby: They took all the lake tonnage we sold last year.

Mr. Duncan: You contract for your entire output of lake coal to him?

Mr. Roby: We sold him all the coal we could. He was to have taken more but he had to take some from West Virginia because he could not stand it to pay us the price.

Mr. Duncan: But he took all of your lake coal?

Mr. Roby: Yes, all that we shipped from number eight.

Mr. Duncan: And hauled it from his docks up the lake somewhere?

Mr. Roby: Yes.

Mr. Duncan: Where are his docks?

Mr. Roby: Some at Green Bay.

Mr. Duncan: Any at Duluth?

Mr. Roby: Yes.

Mr. Duncan: Any at Ashland?

Mr. FRANK OSBORNE, president of the Operators' Association, offered as a witness by the Coal Operators:

(R. 1268.)

On direct examination witness testified as follows:

70 Mr. Osborne: For the sake of handling our coal with the least possible trouble and expense to the railroad, we take some of our office men and while—we perhaps do it a little different from some of the rest, because we ship a great deal of Pennsylvania coal and other Ohio coals to the lake front; and we will take one man, if you please, and consign him to a certain port—take Lorain. We will send, say S. H. Robbins, who will take all of those grades of coal consigned to that point. He will take lump, run of mine, nut or slack, whichever it may be. When we order the boats we will order—give notice to the railroad that, for instance, the Hiawatha will be for loading about such a date. Sometimes it is a little shorter than that time and sometimes it overruns—depends upon the speed of the unloading of the boat; and tell them that S. H. Robbins for three-quarter, and they will get that coal ready—giving them sufficient time to run it down to the docks, so that they can handle

the coal at the best possible operation for them and the least delay to the boat possible.

(R. 1269.)

Mr. Hogsett: State those conditions.

Mr. Osborne: We take our coal—in the first place we fill up our mines with orders that we may have to deliver—or rail orders. Then the surplus of these different grades of coal we may order to the lake front, and it is just about on the same line as pouring in from four or five different mines, different streams into a tub, and then, as we want a cargo of coal, we take an order out of that tub—a dipper full or whatever we want for the boat and the freight, we pay to the lake front, and the vessel arrangements we make either by direct contract with the vessel concerned or we take a chance—what I mean by a chance, we keep out a certain percentage of our coal that is not contracted with any boat line and then we utilize a spot boat. For instance, that tub is getting full. The Railroad Company is going to shut off that coal running in there. So if we can get a spot boat we rush it out and dip it out and let it go on.

Mr. Hogsett: When this coal is shipped from the mines it is consigned, as you have stated, to some person in the employ of your company?

Mr. Osborne: Be consigned to one of our employes with the understanding that the railroad company that it is our coal when we pay the freight.

Mr. Hogsett: At the time it is shipped from the mines does your company know where any particular car load or train load of coal will finally go?

Mr. Osborne: Absolutely no; absolutely not. Unless it should be some time that there was a boat at the dock, and a shortage of coal, then we would be after the railroad to rush that coal; that is a very exceptional case now because there is plenty of coal at the lake front.

Mr. Hogsett: This coal is delivered to the purchaser, your purchaser, where, usually?

Mr. Osborne: When we purchase coal?

Mr. Hogsett: No, to the purchaser.

Mr. Osborne: Well, we do that anyway the fellow will take it; give him any kind of medicine he wants on it. The coal is sold very largely f. o. b. boat at the lake front, and that is all the basic price is, your coal f. o. b. at the lake front. Sometimes we will sell a man a block of coal at the lake front and he will request us to take a charter. We will take a chance on it or we may contract his coal.

(R. 1271.)

Mr. Osborne: The No. 8 coal, as I have explained, is thoroughly a steam coal; hence it takes the low prices and it is in competition with all the steam coal that there is from other states. It goes—we have a dock—the best comparison is from our own situation; we have a dock at the head of the lakes and we make a particular drive on our No. 8 coal; believing that was the weak member, and

forced it on the fuel proposition at the head of the lakes and in that market this year our prices are reduced from 20 to 30 cents a ton, with no decreased cost whatever.

(R. 1305, 1306, 1307.)

On cross-examination witness testified as follows:

Mr. Duncan: And the most of your lake tonnage, in fact all of your tonnage goes to the northwest to your northern Ohio coal docks?

Mr. Osborne: No, sir, we have some railroad trade outside that.

Mr. Duncan: That is a railroad trade in the northwest.

Mr. Osborne: Yes, sir, the northwest Canada.

Mr. Duncan: What point do you deliver your lake coal when consigned to the railroad trade?

Mr. Osborne: To Depot Harbor.

Mr. Duncan: You have no dock there?

Mr. Osborne: No.

Mr. Duncan: Your dock is located at what point?

Mr. Osborne: At West Superior, that is Duluth Harbor, you know.

Mr. Duncan: Now when you say that you do not know where the coal is to go that comes from the mine, you mean that you do not know to what point in the north west each particular car of coal that is sent up to this bucket or tub at the lakes is to go?

Mr. Osborne: Either that or train load.

Mr. Duncan: Or train load?

Mr. Osborne: Yes, sir.

Mr. Duncan: But you are pouring it all into the tub?

Mr. Osborne: Sure.

Mr. Duncan: To be taken out?

Mr. Osborne: Yes.

Mr. Duncan: And distributed in the north west?

Mr. Osborne: To be taken to our dock or some other place on some other order that may come in.

Mr. Duncan: Well all of the coal that goes in there that takes the lake rate goes to the north west doesn't it?

Mr. Osborne: No, some of it goes to Detroit; some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Mr. Duncan: You pay the local rate if you divert it?

Mr. Osborne: Yes and take your demurrage charges too.

Mr. C. E. MAURER, witness offered by the Coal Operators. On direct examination witness testified as follows:

(R. 800 to 813.)

Mr. Hogsett: Now, Mr. Maurer, you ship coal from your mines to Huron and what other points on the Wheeling and Lake Erie?

Mr. Maurer: Only to Huron. We have shipped to Cleveland, but they are taking no coal there at this time.

Mr. Hogsett: That coal, or a part of it at least, is afterwards transported to various points on the great lakes?

Mr. Maurer: Part of it; part of it is used for vessel fuel.

Mr. Duncan: It takes another rate, doesn't it?

Mr. Maurer: Yes.

Mr. Hogsett: I wish you would explain to the Commission how your shipments from the mines of what is designated as lake coal, are made?

Mr. Maurer: On the Wheeling & Lake Erie the coal is weighed at the mine. The shipping clerk at the mine telephones the shipment into the office at Dillonvale. I mean the Wheeling & Lake Erie billing office at Dillonvale. Then in the evening, after the day's work is done, he makes out a mine report, one copy of which he sends to the agent at Dillonvale, one copy goes to Mr. Booth, of the Wheeling & Lake Erie, and one copy comes to our office.

Mr. Duncan: Who is it makes this report?

Mr. Maurer: The shipping clerk at the mine.

73 Mr. Duncan: Your shipping clerk?

Mr. Maurer: Yes; and this is a copy of the report that comes to our office, to Mr. Booth's office, and to the Wheeling & Lake Erie agent at Dillonvale (producing same).

Mr. Hogsett: We desire to offer this report which the witness has just submitted, in evidence and will ask to have it marked Exhibit 46.

And thereupon, the paper writing last above offered is admitted in evidence on behalf of the complainant and is hereto attached marked exhibit No. 46 and made part hereof.

Mr. Maurer: There are 29 cars of lake coal in that day's shipment.

Mr. Hogsett: Now go ahead with your answer.

Mr. Maurer: You refer to lake coal?

Mr. Hogsett: Yes.

Mr. Maurer: You understand that the lake coal referred to is lake coal that goes to Huron. It is consigned to the Glens Run Coal Company at Huron. If we have various grades of coal, we designate some of the office employes in whose name the coal is shipped. For example, if we were shipping mine run coal, we might call it S. B. Cooledge coal, or if we were shipping inch and a quarter lump, we might ship it to C. E. Sullivan in care of the Glens Run Coal Company, the name being for the purpose of designating the different grades of coal, and when we desire this coal loaded, we would notify the Wheeling & Lake Erie to load a certain vessel with C. E. Sullivan's coal, or Glens Run Coal or S. B. Cooledge coal, and that would simply indicate the grade of coal that was to be loaded on the vessel.

Mr. Maurer: When the coal leaves the mine it is simply marked "lake coal" and is consigned to Huron. At the time of shipment we do not know what boat will take it or to what point it will go, or whether en route part of it may not be re-consigned for some other purpose, or whether part of the coal will be used for fueling boats. That is no distinct car moved to any particular place or to any particular ultimate destination.

Mr. Hogsett: Other than Huron?

Mr. Maurer: Other than Huron. I may say when a boat is loaded we do not designate what cars shall be loaded on the boat, but the railroad company goes out and picks up sufficient cars of that grade of coal to load the boat.

74 Commissioner Hughes: Is this coal all subject to reconsignment at any time after it leaves the mines; that is do you hold that right or power to reconsign the coal?

Mr. Maurer: The coal all belongs to the Glens Run Coal Company after it arrives at Huron.

Commissioner Hughes: And it is subject to reconsignment at any time?

Mr. Maurer: Subject to reconsignment.

Mr. Duncan: I do not think the witness understands the question of the Commissioner.

Mr. Maurer: I certainly do.

Mr. Hogsett: When you have gotten a boat to deliver a cargo of coal, you make a bill for that cargo, do you?

Mr. Maurer: Do you want the steps as we go along, the steps we take?

Mr. Hogsett: Just state the steps that you take.

Mr. Maurer: When we secure a boat for loading a cargo of coal, the first step is to call up Mr. Titus, the assistant superintendent of the Wheeling & Lake Erie road and notify him that on a certain day a certain boat will be at Huron to load with Glens Run coal, and simply request him to have the coal there to load the boat. That is all we have to do with the railroad company. Ordinarily we cover with the vessel people our contract tonnage. In other words, if we are figuring on shipping 150,000 tons of lake coal we will probably distribute that tonnage among three or four shipping concerns. For example, the United States Transportation Company, the Gilchrist Transportation Company or some other transportation company covering that entire tonnage at a stated rate of freight to the different ports where we expect to ship. Then we notify these companies, whichever one we may select, that on a certain date we desire to load a cargo. They report to us the name of the vessel, if they have one. Immediately upon the receipt of that report we fill out what we call a charter confirmation, giving the capacity and name of the vessel, where to load, and to what destination she is to go, the rate of freight and any other information that may be necessary, what kind of a vessel, where the vessel is to report for fuel, and whatever instructions may be necessary with reference to the vessel.

Mr. Duncan: What is that last statement about reporting for fuel?

Mr. Maurer: Whether she reports for fuel or not and where the vessel is to report for fuel.

Mr. Duncan: What fuel?

Mr. Maurer: Her own fuel.

75 And thereupon, blank form of charter confirmation is offered and admitted in evidence on behalf of the complainant and is hereto attached marked Exhibit 47, and made part hereof.

Mr. Hogsett: Right in that connection, Mr. Maurer, let me ask you whether or not there is any portion of that coal delivered to the purchasers f. o. b. vessel at Huron?

Mr. Maurer: Practically all delivered to the purchasers f. o. b. vessel at Huron, although you may make a price at the other end, but as far as our shipments are concerned, we nearly always make them f. o. b. Huron or Cleveland.

Mr. Hogsett: Then where it is delivered f. o. b. vessel at Huron, these orders are orders given to the vessel owners?

Mr. Maurer: Yes, we call it a charter confirmation.

Mr. Hogsett: You do that for the purchaser of the coal?

Mr. Maurer: Yes, we do that for the purchaser of the coal. We charter the boats. We sometimes agree in selling the coal that we will take care of the charter. That is ordinarily the case that we will take care of the furnishing of vessels and the chartering.

Mr. Hogsett: You mean by furnishing the vessel, making the arrangement with the vessel owner?

Mr. Maurer: Yes.

Mr. Hogsett: For the use of the vessel to ship the cargo in?

Mr. Maurer: Yes; to ship the cargo in.

Mr. Maurer: If the Commission will let me go on, I can explain the whole transaction. After the vessel is loaded sometimes the Wheeling & Lake Erie call up and notify us that the boat has cleared and has been loaded with so many tons of coal, but ordinarily we wait until we get a report of this kind (producing same) from the dock superintendent at Huron showing the boat, the date she was loaded and the number of cars and the tonnage.

Mr. Maurer: Upon receipt of that notice usually the first thing we do is to insure the cargo. Then we make out bill of lading in this form (producing same) showing the destination, showing the name of the boat, showing the number of tons and the kind of coal, the rate of freight, consigned by ourselves as the consignor.

Mr. Hogsett: The lake freight, you mean?

76 Mr. Maurer: Yes; the lake freight. Then we mail this bill of lading to the consignee at Ashland or Duluth, as the case may be, mailing him two or three copies of the bill of lading, one of which he hands to the captain of the boat on his arrival there, and on that bill of lading the captain collects the freight. Sometimes that is done at the other end and sometimes at this end.

Commissioner Hughes: Is the coal that you land on the dock there always sold before you land it?

Mr. Maurer: No; it may be shipped and sold afterwards. When anybody wants a certain amount of coal we take it out of the bunch. There may be three or four or five hundred cars of coal there, and somebody calls up and says, "We want five hundred of this," or "six hundred of that grade of coal."

Mr. Maurer: Part of it may be sold. Sometimes we have a bunch sold before hand.

Mr. Hogsett: Mr. Maurer, you were saying something yesterday afternoon about insurance taken out on the cargo coal. Will you

state to the Commission how that is done. Who takes it out and for whose account and benefit is it taken out?

Mr. Maurer: If the coal is sold f. o. b. vessel Huron we take it out for the consignee, for and on account of the consignee.

Mr. Hogsett: Now, Mr. Maurer, you may state whether or not you dispose or sell any of this coal after it has been taken to Huron?

Mr. Maurer: We dispose of a great deal of it after it has been taken to Huron.

Mr. Hogsett: Do you re-consign any of the coal either en route or after it goes there to other points than Huron, in Ohio?

Mr. Maurer: Never after the——

Mr. Hogsett: I mean do you divert it?

Mr. Maurer: I was answering the question. Never after it gets to Huron because in order to divert to other points on the Wheeling & Lake Erie it would of necessity have to go back to Norwalk. But any coal that is on the siding prior to reaching Norwalk we frequently divert to other points.

(R. 824) (R. 825)

77 Commissioner Gothlin: Going back for a minute, there is one point that the commission is not clear on. I believe you stated you shipped to the port right along whether you have orders or not?

Mr. Maurer: We always keep a quantity of coal on the dock provided we have any lake shipments whatever.

Mr. Arnold: That is you have the cars on the dock?

Mr. Maurer: We keep the cars on dock or substantially on the dock; They are along the line of the railroad some place.

Commissioner Gothlin: Briefly what is the reason you ship that way instead of waiting until you have orders for the coal?

Mr. Maurer: In order to have the coal. It is a large quantity ordinarily that you sell at one time. For example a boat of ten thousand tons capacity—an order for ten thousand tons would require a boat of that capacity. To accumulate that much coal and take care of your business unless you had a very large mine would mean three or four weeks before you could accumulate it.

Commissioner Gothlin: You anticipate that?

Mr. Maurer: Yes, we anticipate that. And we ship there what we term our surplus coal. For example we are running today and we have ten cars left over and if we had no consignee in Ohio or other points that surplus would go to the lakes to await orders for shipment up the lakes. But you understand we have orders. We have a certain tonnage sold all the time.

(R. 834) (R. 835)

Mr. Hogsett: Mr. Maurer, let me ask you another question. I will ask you whether or not some of the coal produced in the No. 8 district is put upon your own docks at lake ports?

Mr. Maurer: Yes, you mean at the head of the lakes?

Mr. Hogsett: Yes. Now that particular coal is used for commercial purposes, is it not?

Mr. Maurer: Steam and commercial.

Mr. Hogsett: That is put in competition with coal from other districts and from the West Virginia Districts, particularly in the commercial market?

Mr. Maurer: Do you mean all rail coal?

Mr. Hogsett: Yes, sir.

Mr. Maurer: Yes, sir. It meets in competition with all rail coal shipped from West Virginia via ferry lines and via Chicago.

Commissioner Hughes: Where there is a reconsignment of coal that comes from these lines to lake ports it may become commercial coal, that is true.

78 (R. 836)

Mr. Hogsett: Yes, and when it goes out into the interior there it meets West Virginia coals?

Mr. Hogsett: In competition with this particular coal from the No. 8 District. Now that coal has gotten into that community up there in the same way probably that some of this has and some of it has gotten in there by all rail route.

Mr. Hogsett: Yes, it is a charge on the coal. Then that same coal—some of it gets into the markets in the interior after it reaches the head of the lakes and when it gets there it meets the coal from West Virginia.

(R. 870, 871)

Commissioner Sullivan: Mr. Maurer, if you would ship your coal by rail and not partially by boat wouldn't it be very materially—in other words don't the loading in the boat and unloading make you a lot of slack?

Mr. Maurer: Yes.

On cross-examination, witness testified as follows:

(R. 878 to 886, inclusive)

Mr. Duncan: Has your company a dock at the head of the lakes?

Mr. Maurer: Yes, we are interested there.

Mr. Duncan: What portion of your lake coal is consigned to that dock?

Mr. Maurer: Last year I think better than ninety per cent of it went—no, there wasn't that much last year. Last year probably 75 per cent of it went on our own dock.

Mr. Duncan: But 75 per cent of your lake coal is put on your own docks.

Mr. Maurer: Yes.

Mr. Duncan: Where?

Mr. Maurer: At Ashland.

Mr. Duncan: How far is Ashland from Duluth?

Mr. Maurer: I think it is—I cannot tell you the distance; probably ninety miles, I should judge, or something like that; probably more than that by rail.

Mr. Duncan: And the rest of your lake coal goes to Duluth, does it?

Mr. Maurer: No.

Mr. Duncan: To the independent docks there.

Mr. Maurer: No; last year the outside coal which we sold went to Milwaukee.

79 Mr. Duncan: Did it go to Milwaukee by the rail and lake route or by the cross ferry route?

Mr. Maurer: By the lake.

Mr. Duncan: That is, the coal was taken to Huron and there re-shipped and went up around the lakes to Green Bay?

Mr. Maurer: Yes.

Mr. Duncan: What disposition did your company make of the coal that was consigned to your docks at Ashland—was it Ashland?

Mr. Maurer: Yes.

Mr. Duncan: For what purpose was it used?

Mr. Maurer: The large majority of the coal went for railroad fuel.

Mr. Duncan: At Ashland?

Mr. Maurer: Yes; some of it went for commercial purposes.

Mr. Duncan: To what company?

Mr. Maurer: To what companies?

Mr. Duncan: Yes, what railroad companies?

Mr. Maurer: The Northwestern and I think the Wisconsin Central or the Canadian Pacific or the Northern Pacific, I should say.

Mr. Duncan: What proportion of the tonnage at your Ashland dock was used for those purposes by these railroads?

Mr. Maurer: I should say sixty per cent.

Mr. Duncan: And the balance for commercial purposes?

Mr. Maurer: The balance for commercial steam trade?

Mr. Duncan: What do you mean by commercial steam trade?

Mr. Maurer: I mean it went to points probably west as far as in to the Dakotas and to points in Wisconsin and Minnesota.

Mr. Duncan: Didn't any of it come back to St. Paul and Minneapolis?

Mr. Maurer: Very little of our coal gets into St. Paul on account of the rate from Southern Illinois which cuts us out of St. Paul and Minneapolis.

Mr. Duncan: The cross lake ferry lines put it into St. Paul?

Mr. Maurer: No, not cross lake ferry lines, but the rate from southern Illinois to St. Paul and Minneapolis cuts us out.

Mr. Duncan: Was any of your coal used at the Zenith furnaces; that is near your docks at Ashland?

80 Mr. Maurer: I think the Zenith furnaces used Pittsburg nut that we brought from Pittsburg—

Mr. Duncan: Didn't use any of your coal?

Mr. Maurer: No, I think not. Did you say the Zenith furnace company?

Mr. Duncan: Yes.

Mr. Maurer: No, I don't think any was used at the Zenith furnace. I was thinking of the Ashland Furnace Company.

Mr. Duncan: The Ashland Furnace Company used none of your coal?

Mr. Maurer: I think not. They might have used a little. Very small quantity if they used any of it. I think they use Pittsburg nut coal. I don't know whether that is the name of the concern. I know there is a furnace there—a charcoal furnace there or something of that kind.

Mr. Duncan: Now, your average freight rate from the Ohio lake ports to the Northern lake ports will average anywhere from thirty to thirty-five cents a ton, will it not, dependent upon the season?

Mr. Maurer: In 1907, I think we paid the major part of the season, thirty-five cents, but the latter part of the season we paid as high, I think as \$1.25.

Mr. Duncan: But that was where you were without contracts?

Mr. Maurer: Yes, that was, as I said, on wild cargoes.

Mr. Duncan: In other words, you had underestimated the amount of coal you would ship up the lake and had failed to make provisions for this shipment?

Mr. Maurer: It was wild tonnage, as I explained. It was not contract tonnage.

Mr. Duncan: And I say the reason is that you did not contract for that amount of tonnage is because you underestimated the amount of coal you would ship up the lake and had failed to make provisions for its shipment?

Mr. Maurer: I think the real reason was on account of the demand for vessels that year that were only able to cover a certain portion of the tonnage. The vessel rates depend to a great extent on the law of supply and demand.

Mr. Duncan: And you were caught at the end of the season?

Mr. Maurer: We were caught at the end of the season.

Mr. Duncan: And had to pay the monopoly prices?

Mr. Maurer: We had to pay the going prices.

Mr. Duncan: On how many cargoes did you paid \$1.25?

81 Mr. Maurer: I couldn't tell you the exact number on which we had to pay a higher rate than one dollar, but it was on several carloads; I couldn't tell you how many.

Mr. Duncan: But the average will approximate around 35 cents?

Mr. Maurer: I think the average will run 35 cents.

Mr. Duncan: So that you were able to transport this railroad fuel coal from the number eight district up to the Ashland district for approximately about \$1.20 or \$1.25 a ton?

Mr. Maurer: Yes, along side dock.

Mr. Duncan: Now, as I understand you, Mr. Maurer, your company by means of letters, arranges for the transportation of what you estimate will be your tonnage for the northwest for the season?

Mr. Maurer: Yes.

Mr. Hogsett: What do you mean by "your company"; do you mean the dock company or the coal company?

Mr. Duncan: Don't you understand my question, Mr. Maurer?

Mr. Maurer: Yes, you said "Your company"; and when I speak of our company, I mean the Glens Run Coal Company, if that is what you mean?

Mr. Duncan: That is what I mean.

Mr. Maurer: The Glens Run usually covers what we estimate the tonnage to be.

Mr. Duncan: And that arrangement is confirmed, as you have stated by letters?

Mr. Maurer: Sometimes by contract drawn up and signed by both parties and sometimes—ordinarily simply by letter.

Mr. Duncan: But it is a contract for the covering of what you estimate will be the shipment to the northwest for a certain season.

Mr. Maurer: Yes.

Mr. Duncan: And it is pursuant to that contract that the various vessels in which you ship this coal go to the port at which you send it for transshipment which in the case of your mines on the Wheeling & Lake Erie is at Huron?

Mr. Maurer: If it should be a contract vessel. Lots of times we get vessels outside of that.

Mr. Duncan: I mean one of the vessels with whom you have made arrangements at the commencement of the season.

Mr. Duncan: No, I understand that. So that your company at the beginning of the season estimates the quantity of coal it
82 wants to ship to the northwest ports or to your dock or to an independent dock?

Mr. Maurer: Yes.

Mr. Duncan: And you proceed to start that amount of coal to the northwest; sometimes you do not sell it in advance; isn't that true?

Mr. Maurer: Yes.

Mr. Duncan: So that you take it in your own dock in the northwest and hold it, don't you?

Mr. Maurer: Why, we usually——

Mr. Duncan: Answer my question.

Mr. Maurer: Yes, we put it on our dock.

Mr. Hogsett: What do you mean by your own dock?

Mr. Maurer: Well, the Glens Run Coal Company don't own any dock.

Mr. Duncan: It is the dock in which the Glens Run Coal Company is interested.

Mr. Maurer: Yes, that is all. No, I will take that back. The Glens Run Coal Company is not interested in it, but officers of the Glens Run Coal Company are interested in it.

Mr. Duncan: Well, it is the same thing. You do not treat it as an independent concern, do you?

Mr. Maurer: It has no connection with the Glens Run Coal Company.

Mr. Duncan: But it has the same officers?

Mr. Maurer: The same officers, yes sir.

(R. 888 and 889)

Mr. Duncan: Now, going back to this transportation of coal from the number eight district to the northwest territory, as I understand

you, some of your coal proceeds from the mine without being sold or before you have made a contract of sale?

Mr. Maurer: Sometimes—quite frequently, yes, sir.

Mr. Duncan: But the estimate that has governed your contract with the transportation company is presumed to cover what in your judgment as a coal man think will be your lake shipment for that year, providing you can get the transportation companies to contract up that high.

Mr. Maurer: If you will put the horse at the other end of the cart, you will have it right.

Mr. Duncan: I will put it the other way then.

Mr. Maurer: This year we have shipped 25,000 tons to the lakes before we had any vessel contract and that is done very frequently.

Mr. Duncan: All right; but you make your fuel contracts as early in the season as you can?

Mr. Maurer: No, we could have made them last January if we had wanted to, but we didn't.

83 Mr. Duncan: All right; how late in the year do you make them?

Mr. Maurer: I think we covered our vessel tonnage along about the 1st of June this year.

Mr. Duncan: You have covered your lake tonnage for this year, have you?

Mr. Maurer: I do not think we have it all covered.

Mr. Duncan: You are still at it, are you?

Mr. Maurer: I think not.

Mr. Duncan: Why aren't you at it?

Mr. Maurer: Because there are plenty of vessels and we can get boats whenever we need them.

Mr. Duncan: But if there were not plenty of vessels you would contract in advance, as far as you could?

Mr. Maurer: We would probably try to.

Mr. Duncan: But there are plenty of eggs on the market and you saw no necessity for buying them all up in advance?

(R. 891.)

Mr. Duncan: With this rate of 90 cents, Mr. Maurer, and your lake rate of 30 cents, you are able to get your coal into the north-west which, as you have testified, is used both for railway fuel and for commercial steam purposes?

Mr. Maurer: Yes, and there may be some of it used for domestic purposes; I don't know.

(R. 895, 896 and 897.)

Mr. Duncan: Now, this coal that goes forward to Huron for the lake is classified as I understand you by the names of the consignee; that is, you send it forward under one name if it is three-quarter coal; is that it?

Mr. Maurer: Yes.

Mr. Duncan: And under another name if it is the run of the mine?

Mr. Maurer: Yes.

Mr. Duncan: And what other classification do you have?

Mr. Maurer: Slack or nut. Ordinarily we would have a separate classification although sometimes we do not.

Mr. Duncan: And do you advise the railroad companies of the name that is to indicate the quality of the coal?

Mr. Maurer: I do not know what the Wheeling & Lake Erie does, whether they ask us for that or not.

Mr. Duncan: How would they sort it then when it reaches Huron and they wanted to load one boat with a certain quality or class of coal?

Mr. Maurer: They might ascertain it by the billing; part of it being billed mine run and part three-quarter and part inch and a quarter.

84 Mr. Duncan: Would it be billed three quarter when consigned?

Mr. Maurer: Yes.

Mr. Duncan: What is the object of having it billed in the name of a particular person for purposes of identification if it is identified by classification as you have just suggested?

Mr. Maurer: Another way of designation.

Mr. Duncan: An additional identification.

Mr. Maurer: Yes.

Mr. Duncan: As a matter of fact your company and all other companies give the railroad company the key as you may say showing what name means what kind of coal?

Mr. Maurer: Yes—we hardly ever do with the Wheeling & Lake Erie, but we always do with the Pennsylvania.

Mr. Duncan: Why don't you with the Wheeling & Lake Erie?

Mr. Maurer: Because we seldom ship more than one grade of coal over the Wheeling & Lake Erie.

Mr. Duncan: But if you did, you would probably advise them?

Mr. Maurer: We would notify them before we loaded it, yes, sir.

Mr. Duncan: So that they would know whether S. B. Cooledge coal for instance was the quality of coal you wanted loaded on a particular boat or not?

Mr. Maurer: Yes.

Mr. Duncan: So that when you have accumulated a cargo at Huron or along the line and your boat has arrived at Huron, they would know what cars to take out and unload into the boat; if you were wanting to fill it with that particular quality of coal?

Mr. Maurer: We may have three or four cargoes.

Mr. Duncan: And the same would apply to three or four cargoes?

Mr. Maurer: We would not know what particular cars, but we would know the particular grade of coal.

Mr. Duncan: Of the coal in cars that had moved forward to Huron for lake shipment?

Mr. Maurer: Yes.

(R. 930.)

Mr. Maurer: I want to say to the Commission that prior to 1903 and 1904, outside of one or two docks, none of the railroads of the northwest used number eight coal for railroad fuel purposes, and through the efforts of the eastern Ohio operators and their dock facilities in the years 1906 and 1907, we succeeded in inducing the railroads to take large quantities of this coal.

The northwestern railroads sent their fuel inspector down and I spent three days with him in the mines in eastern Ohio, and finally got them to consent to take 40,000 tons of number eight coal, which is practically the first coal they have taken. We built up that trade and that trade is now being taken away from us.

Mr. Arnold: By whom?

Mr. Maurer: By West Virginia.

(R. 940.)

On re-direct examination witness testified as follows:

Mr. Maurer: When the dock company at the head of the lakes desires a cargo they notify us that they would like to have a cargo shipped of a certain tonnage, asking us to insure it, to secure the vessel and report to them the name of the vessel and the tonnage, which we do, notifying them by wire of the date of clearance and the number of tons.

Mr. Hogsett: Now, you were asked about the total transportation cost from the mine to the dock at the head of the lakes and you have said that that would aggregate about \$1.20. When the coal is taken to the head of the lakes to the dock company it has to be taken from the boat and there put on board cars, does it not?

(R. 941.)

Mr. Hogsett: I will call your attention to the statement made in the minutes of the proceedings of a special meeting of the representatives of dock owners, ferry lines and railroads interested in the transportation of bituminous coal via rail and lake, and Lake Michigan car ferry lines held at Chicago, Illinois, on Tuesday, January the 12th, 1909, and which was read in evidence as follows:

"Freight, mines to lake.....	.90
Average Lake rate.....	.35
Handling charge on dock.....	.42
Loss and degradation in handling.....	.30
Carrying coal on docks, interest charge06

Making a total of..... 2.03"

I will ask you if that is approximately correct?

Mr. Maurer: By whom was that prepared?

Mr. Arnold: Twenty three dock managers.

Mr. Hogsett: By the dock managers.

Mr. Maurer: I should think that was a very fair statement of the cost of the coal including those charges. I notice there they figure the degradation in cents instead of percentage. I figured it at twenty per cent, and I see there that the figure degradation at thirty cents a ton.

86 Mr. B. W. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company. On cross examination by Mr. Duncan, witness testified as follows:

(R. 1684.)

Mr. Duncan: The rate f. o. b. vessel requires the shipper to furnish the vessel.

Mr. Worthington: Yes, sir.

(R. 1685.)

Mr. Duncan: And you are unable to load the coal into the vessel unless the vessel owner consents?

Mr. Worthington: Exactly.

Mr. Hogsett: Does it require the shipper to furnish the vessel any more than it does anybody else?

Mr. Worthington: It requires the shipper, because the shipper arranges with us to place the coal aboard the vessel. We would not take an order from the consignee. The shipper instructs us what boat he wants that coal put into.

Mr. Duncan: Would you ship that coal to Huron f. o. b. vessel without knowing what the shipper intended to furnish you a boat in which to load it?

Mr. Worthington: No. The reason the rate is made ninety cents is because we understand that we are furnishing what is known as lake coal and that must be loaded on board vessel as soon as the shipper instructs us what boat he wants the coal loaded into.

Mr. Duncan: For transportation to the northwest?

Mr. Worthington: For transportation to the northwest.

(R. 1960.)

Mr. Duncan: Why is it your company has a lower rate on the lake coal passing through the Huron gateway than it has on commercial coal delivered in Huron?

Mr. Hogsett: We object to that question unless this witness made the rate.

Mr. Duncan: He is responsible for the rate.

Commissioner Hughes: I suppose he is answerable for the rates in effect.

Mr. Hogsett: If he did not make them he may not know the reason why they were made. It may have been the policy of the management to adopt rates made by somebody else but the question is here what was the reason for making that rate. Now if he reason for his making that rate was because it was made by somebody else that is one thing. But I understand the question to go the reason for making this rate originally. Unless he made it he would not know what the reason was except as he may have heard what

87 the reason was. The best evidence as to the reason for the making of the rate should come from those who actually made it.

(R. 1961.)

Mr. Duncan: I will repeat the question. Why is it your custom to have a lower rate on lake coal passing through Huron gateway than it is on commercial coal delivered in Huron?

Mr. Worthington: Simply because it is made on the basis of a through rate and to enable No. 8 lake coal to be marketed at Duluth and the northwest delivery points.

Mr. T. R. GILMORE, Superintendent of The Wheeling & Lake Erie Docks at Huron, and in charge of the loading of coal into the vessels, witness offered by the Railroad Company.

On direct examination witness testified as follows:

(R. 2199), (2200).

Mr. Duncan: Your jurisdiction is confined to the loading and unloading of the vessels?

Mr. Gilmore: Yes.

Mr. Duncan: Now do you keep a record of the cars that are unloaded with coal?

Mr. Gilmore: Yes.

Mr. Duncan: In what shape?

Mr. Gilmore: Well, a list of all coal that is loaded in the boats. We check against the agent's list and then we make our cargo manifest or statement from that.

Mr. Duncan: What do you mean by cargo manifest or statement?

Mr. Gilmore: Well, we furnish the shipper with a cargo statement of the car numbers and weights of all coal loaded into the boat, whether cargo or fuel.

Mr. Duncan: That is that has been loaded into a particular boat?

Mr. Gilmore: Yes; the boat's name is at the head of the cargo statement.

Mr. Duncan: And are blanks for that particular purpose furnished you by the shippers?

Mr. Gilmore: Yes.

Mr. Duncan: Are the blanks all the same?

Mr. Gilmore: No; different forms but practically the same heading.

Mr. Duncan: And that information that you furnish them is furnished on the blanks which they have furnished you?

Mr. Gilmore: Yes.

Mr. Duncan: Do you know what use is made of that cargo manifest or statement?

88 Mr. Gilmore: The bill of lading is made from the cargo statement.

Mr. Duncan: What if any trimming service is performed by your company in loading coal into vessels?

Mr. Gilmore: Yes, we have to do the trimming of the coal in the boats.

Mr. Duncan: Do you trim by machinery?

Mr. Gilmore: Well, we have an automatic trimmer on the machine, but of course it does not trim all the coal.

Mr. Duncan: How do you trim the portion that is not trimmed by automatic machinery?

Mr. Gilmore: With men.

Mr. Duncan: Where do the men have to go?

Mr. Gilmore: In the hold of the boat.

Mr. Duncan: And what does that trimming consist of?

Mr. Gilmore: Well in getting the coal back under the docks and back under the boilers so as to get the full load of coal on the boat.

(R. 2201.)

Mr. Duncan: What I want to know is can you tell with any degree of certainty when boats will be coming in or whether they are coming in at different periods?

Mr. Gilmore: Well, of course the coal shipper reports to Mr. Titus when they have a boat coming to Huron and about what time she will be there and Mr. Titus wires me.

(R. 2204, 2205, 2206 and 2207.)

Commissioner Gothlin: What did you mean a few moments ago when you said something about the bill of lading being made up on the cargo statement?

Mr. Gilmore: Well, of course the cargo statement, that gives the tonnage.

Commissioner Gothlin: What bill of lading is made up?

Mr. Gilmore: The bill of lading that the boat is billed out on.

Commissioner Gothlin: You mean the lake bill of lading?

Mr. Gilmore: Yes, the lake bill of lading.

Mr. Gilmore: Yes. The bills of lading used to be made altogether in the dock offices, but the last six or eight years they have been made in the coal offices and we furnish this cargo statement to the coal shipper showing the car numbers, the weights and the total tons of coal in the boat and then the bills of lading are made by the coal shipper at their office.

Commissioner Gothlin: Who signs it?

89 Mr. Gilmore: We sign the cargo statements. I sign the cargo statement.

Commissioner Gothlin: Who signs the bill of lading?

Mr. Gilmore: The shipper.

Commissioner Gothlin: You do not mean that the shipper signs the bill of lading?

Mr. Gilmore: Yes, showing that he has shipped so much coal.

Commissioner Gothlin: Isn't it the vessel company?

Mr. Gilmore: No, sir; the shipper of the coal shows that he has shipped in good order on that date so many tons of coal to such and such a place.

Commissioner Gothlin: Those are the shipping instructions, are they, don't the steamship company give the bill of lading showing that they have received so many tons of coal to be transported to a certain point?

Mr. Gilmore: No, because the steamship company would not know anything about the tons of coal that they had received. It is the shipper that makes out those bills.

Commissioner Gothlin: Who charts this boat?

Mr. Gilmore: The coal shipper.

Commissioner Gothlin: Do you mean the operator at the mine?

Mr. Gilmore: No, sir, in most cases the party to whom the coal is consigned, that is at Huron. For instance, the coal comes into Huron billed to M. A. Hanna & Company and M. A. Hanna & Company charters the boat for that particular kind of coal—train coal. They charter the boat for that coal to carry it.

Commissioner Gothlin: And Hanna is the party who mines the coal?

Mr. Gilmore: Well I should judge so, yes, sir.

Mr. Duncan: The same as the Glens Run Coal Company?

Mr. Gilmore: Well, that is Mr. Maurer. But there are cases where the man who wishes the bill of lading I guess is not a miner of coal but he buys the coal from the mines and ships it billed to himself, as in the case of C. Reiss. Mr. Kennedy takes the coal for the C. Reiss Coal Company and the coal comes in billed to C. Reiss.

Mr. Arnold: Where is C. Reiss & Company?

Mr. Gilmore: Well, he is in Milwaukee, I think.

Mr. Duncan: His docks are at Milwaukee?

Commissioner Gothlin: After you put it into the vessel you cease to have anything to do with it?

90 Mr. Gilmore: Yes, sir.

Mr. Duncan: But the railroad company's duty is not ended until it is trimmed in the boat?

Mr. Gilmore: No, sir.

Mr. Duncan: And until it furnishes this cargo statement?

Mr. Gilmore: Yes.

Mr. J. P. Orr, witness offered by the Receiver. On direct examination witness testified as follows (R. 2309):

Mr. Duncan: Where is the Central Market in the Northwest?

Mr. Orr: St. Paul, Minneapolis, and points beyond that.

Mr. Duncan: So that coal that moves via the lakes as well as that which moves across the lakes meets in that common territory in the northwest?

Mr. Orr: Yes, sir.

(R. 2310.)

Mr. Duncan: What do you mean by "if the rate to Duluth

Mr. Orr: Undoubtedly be reduced in proportion. The rate today for instance from the No. 8 district say to Duluth is one dollar per ton. If the rate up to Duluth was reduced almost to one dollar a ton it can be readily seen we could not maintain a dollar a ton rate to Duluth and in that territory.

Mr. Duncan: What do you mean by "if the rate to Duluth were—

Mr. Orr: I mean the proportional rate which we term the lake cargo rate plus the vessel rate—I mean the addition of those two together would make a rate such as would interfere with the trade through Michigan.

Mr. Duncan: In what way do the railway companies treat the lake rate?

Mr. Orr: As a proportion of a through rate.

Mr. Duncan: Through rate to what point?

Mr. Orr: To the Detroit River and the northwest.

Mr. Duncan: In connection with the vessel carriage?

Mr. Orr: Yes, it is a proportional rate, is what it really is. Now if that rate was reduced—if what I said here would follow it means that on lake coal there would be a reduction on about fifteen million tons of coal and on the coal to the west generally there would be a reduction on probably forty million to forty-five million, or fifty million of tons of coal.

91 Mr. H. M. MATTHEWS, coal and ore agent of the B. & O. Witness offered by the Receiver. On direct examination witness testified as follows (R. 2452, 2454):

Mr. Duncan: Now what is your justification for the existing lake cargo rate being less than the commercial rate?

Mr. Matthews: Well it is in effect a proportional rate.

Mr. Duncan: Proportional of what?

Mr. Matthews: Proportional rate to which is added the vessel rate beyond.

Mr. Duncan: And what is the point beyond that is taken into consideration?

Mr. Matthews: Well the whole territory, the bulk of the tonnage of course it is understood goes to Lake Superior and Lake Michigan; and in the discussions I have heard at different times the vessel rates to those lakes were the ones that were mentioned in particular.

Mr. Duncan: Why is it that the lake rate from a particular district to all the lower ports is the same rather than different in view of the fact that you treat it as a proportional rate?

Mr. Matthews: Well, I assume that that is to equalize the through rate; the vessel rate being the same beyond the ports.

Mr. Duncan: That is the vessel rate is the same from all Lake Erie ports to the northwest?

Mr. Matthews: Yes. If there were different rates by vessel the probabilities are that the roads would have established different inland rates the same as they have done to the seaboard on the eastern.

(R. 2454.)

Mr. Duncan: So that your company in the adjusting of these differentials has done what would be done if the lake rates on the lakes were different to different ports?

Mr. Matthews: Yes, take into consideration the vessel rates.

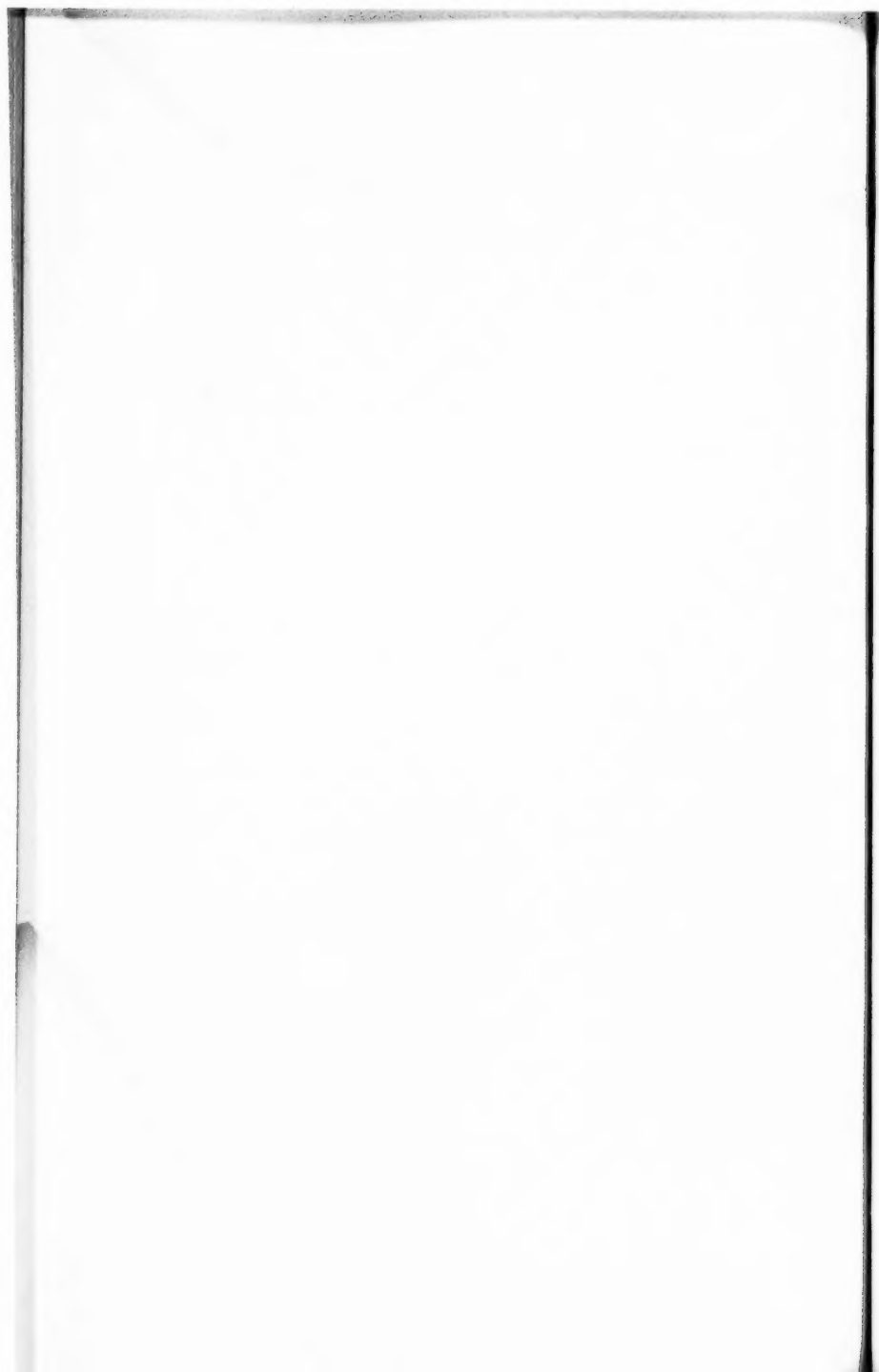
Defendant's Exhibit 22.

Order No.	Car Initial No.	Weight	Size	Consignee	Destination	Route	Account of	Freight Prepaid
Mine	W & L E	44710	3-4	Wab. R. R. Co., % E. Wright S. K.	Springfield, Ill.	Wabash	C. A. How	St. Louis.
#2	"	41755	"	S. P. Bennett Fuel & Ice Co.	Grand Rapids, Mich	G R & I	Consignee	Van Wert, O.
"	"	40497	"	Eric Stone Co.	Willshire, Ohio	"	"	Van Wert, O.
"	"	44784	"	Eric Stone Co.	Willshire, Ohio	"	"	Van Wert, O.
"	"	8726	"	W & L E R. R. Co.	Cleveland, Ohio	"	G. L. Pollock	
#2	"	9029	"	W & L E R. R. Co.	"	"	"	
"	"	8756	"	W & L E R. R. Co.	"	"	"	
"	"	9314	"	W & L E R. R. Co.	"	"	"	
"	"	10001	"	W & L E R. R. Co.	"	"	"	
"	"	8737	"	W & L E R. R. Co.	"	"	"	
"	"	9959	"	W & L E R. R. Co.	"	"	"	
"	"	9344	"	W & L E R. R. Co.	"	"	"	
"	"	30103	"	W & L E R. R. Co.	"	"	"	
"	"	41463	"	W & L E R. R. Co.	"	"	"	
#1	"	12193	"	Glen's Run Coal Co.	Mingo Jct., Ohio	Lake Coal	"	
"	"	5460	"	Glen's Run Coal Co.	Columbia, Ohio	"	"	
"	"	8965	"	Glen's Run Coal Co.	Huron, Ohio	"	"	
"	"	11281	"	Glen's Run Coal Co.	"	"	"	
"	"	42052	"	Glen's Run Coal Co.	"	"	"	
"	"	8725	"	Glen's Run Coal Co.	"	"	"	
"	"	11525	"	Glen's Run Coal Co.	"	"	"	
"	"	10135	"	Glen's Run Coal Co.	"	"	"	
"	"	6435	"	Glen's Run Coal Co.	"	"	"	
"	"	9018	"	Glen's Run Coal Co.	"	"	"	
"	"	10084	"	Glen's Run Coal Co.	"	"	"	
"	"	5778	"	Glen's Run Coal Co.	"	"	"	
"	"	40934	"	Glen's Run Coal Co.	"	"	"	
"	"	11526	"	Paragon Refining Co.	Toledo, Ohio	"	Consignee	
"	"	5035	"	Collins Hahn & Ditzell.	Jackson, Mich	M. C.	Consignee	
"	"	5401	"	Paragon Refining Co.	Toledo, Ohio	"	Consignee	
"	"	41166	"	National Tube Co.	Lorain, Ohio	"	Consignee	
"	"	4474	"	National Tube Co.	"	"	"	
"	"	55419	"	Golf Kirby Coal Co.	Cleveland, Ohio	"	Cuyaboga Coal Co.	
"	"	55104	"	Golf Kirby Coal Co.	"	"	"	
"	"	55087	"	Golf Kirby Coal Co.	"	"	"	

One hour delay on #1 side account of water in motor road.

W & L E 5290 shipped to the National Tube Co., at Lorain Ohio, on the 17th inst should read 5560 100,000.

W & L E 11202 failed to the Clarkson C. & D. Co., on the 24th inst. has been re- consigned to Glen's Run Coal Co., Huron, Ohio.



(*M. A. Hanna & Co. Letter.*)

CLEVELAND, O., *June 18, 1909.*

Mr. F. P. Barr, S. C. S., W. & L. E. R. R., City.

DEAR SIR: We have sold a certain tonnage of No. 8 coal that is to go to Escanaba for the C. Reiss Coal Co. and they request that this coal be shipped to to their own consignee and have selected the name, "F. I. Kennedy." They expect to float one cargo this month of between 7800 and 9000 tons and we will commence shipment on this order about Tuesday or Wednesday next week. We give you this as a matter of information, so that when this coal is offered under the name of Kennedy, you will know for whom it is intended.

Yours very truly,

M. A. HANNA & CO.,
By (W. P. SCHAUFELE).

WPS-N.

Copy to—Mr. A. P. Titus, Asst. Supt., Canton, Ohio.

(Here follows Exhibit 22, marked page 93.)

94 Thereupon the defendant, to maintain the issues on its part, offered the following extracts from said testimony before the Railroad Commission of Ohio in evidence:

Mr. MAURER, a Number Eight operator called as a witness by the complainant.

Mr. HOGSETT: Now, Mr. Maurer, you ship coal from your mines to Huron and what other points on the Wheeling & Lake Erie?

Mr. MAURER: Only to Huron. We have shipped to Cleveland but they are taking no coal there at this time.

Mr. HOGSETT: That coal, or a part of it at least, is afterwards transported to various points on the great lakes?

Mr. MAURER: Part of it; part of it is used for vessel fuel.

Mr. DUNCAN: It takes another rate, doesn't it?

Mr. MAURER: Yes.

Mr. HOGSETT: I wish you would explain to the Commission how your shipments from the mines of what is designated as lake coal are made?

Mr. MAURER: On the Wheeling & Lake Erie the coal is weighed at the mine. The shipping clerk at the mine telephones the shipment into the office at Dillonvale, I mean the Wheeling & Lake Erie billing office at Dillonvale. Then in the evening, after the day's work is done, he makes out a mine report, one copy of which he sends to the agent at Dillonvale, one copy goes to Mr. Booth, of the Wheeling & Lake Erie and one copy comes to our office.

Mr. DUNCAN: Who is it makes this report?

Mr. MAURER: The shipping clerk at the mine.

Mr. DUNCAN: Your shipping clerk?

Mr. MAURER: Yes, and this is a copy of the report that comes to our office, to Mr. Booth's office, and to the Wheeling & Lake Erie Agent at Dillonvale (producing same).

Mr. DUNCAN: Will you produce a few of those for last year's shipments?

Mr. MAURER: I think I can, yes, sir.

Commissioner GOTHLIN: Is that a daily sheet?

Mr. MAURER: Yes.

Commissioner GOTHLIN: Over the one tipple?

Mr. MAURER: Yes.

Commissioner GOTHLIN: How many cars?

Mr. MAURER: I think about 45 or 46 cars here. That was over the two dumps and one tipple.

Commissioner GOTHLIN: How often are they pulled?

Mr. MAURER: I think they switch the mine twice a day. I could not be positive on that.

Mr. DUNCAN: Is that all lake coal?

95 Mr. Maurer: No, sir, it includes all of the shipments for the day.

Mr. Hogsett: We desire to offer this report which the witness has just submitted, in evidence, and will ask to have it marked Exhibit Number 46.

And thereupon, the paper writing last above offered is admitted

in evidence on behalf of the complainant and is hereto attached marked Exhibit No. 46 and made part hereof.

Mr. Maurer: There are 29 cars of lake coal in that day's shipment?

Mr. Hogsett: Now go ahead with your answer.

Mr. Maurer: You refer to lake coal?

Mr. Hogsett: Yes.

Mr. Maurer: You understand that the lake coal referred to is lake coal that goes to Huron. It is consigned to the Glens Run Coal Company at Huron. If we have various grades of coal, we designate some of the office employes in whose name the coal is shipped. For example, if we were shipping mine run coal, we might call it S. B. Cooledge coal, or if we were shipping inch and a quarter lump, we might ship it to C. E. Sullivan in care of the Glens Run Coal Company, the name being for the purpose of designating the different grades of coal, and when we desire this coal loaded, we would notify the Wheeling & Lake Erie to load a certain vessel with C. E. Sullivan's coal, or Glens Run Coal or S. B. Cooledge coal, and that would simply indicate the grade of coal that was to be loaded on the vessel.

Commissioner Hughes: Can they be mixed?

Mr. Maurer: They can be mixed if we wanted to, but ordinarily we try to get a complete cargo on one grade of coal.

Mr. Hogsett: At the time this coal is shipped from the mine does any person know where the ultimate destination of that coal is beyond Huron?

Mr. Maurer: We do not.

Mr. Duncan: We object to that question, if the Commission pleases.

Commissioner Hughes: It is not a proper inquiry. He cannot know that.

Mr. Maurer: I certainly do know it.

Mr. Hogsett: He knows from the character of the shipments that no one can know where the ultimate destination of any car load or train load of this coal is.

96 Commissioner Hughes: That might be reached by a process of reasoning or by drawing a conclusion, but he should state his means of knowledge. You may ask the witness if he knows or is informed, but to ask him whether anybody knows, seems to me is going beyond the knowledge of the witness.

Mr. Hogsett: Is it known by you or anybody else where that coal will ultimately go from Huron?

Mr. Duncan: That question is still objectionable under the ruling of the Commission.

Mr. King: He might be asked as far as he knows.

Commissioner Hughes: The witness may state the facts.

Mr. Maurer: I can give the facts and the reasons why, if that is satisfactory.

Commissioner Hughes: State the facts and let the Commission draw the conclusion.

Mr. Duncan: The defendants' objection is based upon the further fact that the rate complained of is rate f. o. b. vessels, and the only proper subject of inquiry is as to coal sent to the lake to be put on

board vessels, and the ultimate destination of that cargo must be some place beyond the lakes. The gentlemen are bound by the tariff and they have no right to ship any coal other than that provided for by the tariff at a particular rate, and which is the rate involved in this proceeding. I simply want that in the record so that my objection may fully appear.

Question read.

Mr. Maurer: When the coal leaves the mine it is simply marked "lake coal" and is consigned to Huron. At the time of shipment we do not know what boat will take it or to what point it will go, or whether en route part of it may not be reconsigned for some other purpose, or whether part of the coal will be used for fueling boats. That is no distinct car moved to any particular place or to any particular ultimate destination.

Mr. Hogsett: Other than Huron?

Mr. Maurer: Other than Huron. I may say when a boat is loaded we do not designate what cars shall be loaded on the boat, but the railroad company goes out and picks up sufficient cars of that grade of coal to load the boat.

Commissioner Hughes: Is this coal all subject to reconsignment at any time after it leaves the mines; that is do you hold that right or power to reassign the coal?

Mr. Maurer: The coal all belongs to the Glens Run Coal Company after it arrives at Huron.

97 Commissioner Hughes: And it is subject to reconsignment at any time.

Mr. Maurer: Subject to reconsignment.

Mr. Duncan: I do not think the witness understands the question of the Commissioner.

Mr. Maurer: I certainly do.

Mr. Hogsett: When you have gotten a boat to deliver a cargo of coal, you make a bill for that cargo, do you?

Mr. Maurer: Do you want the steps as we go along, the steps we take?

Mr. Hogsett: Just state the steps that you take.

Mr. Maurer: When we secure a boat for loading a cargo of coal the first step is to call up Mr. Titus, the assistant superintendent of the Wheeling and Lake Erie road and notify him that on a certain day a certain boat will be at Huron to load with Glens Run Coal, and simply request him to have the coal there to load the boat. That is all we have to do with the railroad company. Ordinarily we cover with the vessel people our contract tonnage. In other words, if we are figuring on shipping 150,000 tons of lake coal we will probably distribute that tonnage among three or four shipping concerns. For example, the United States Transportation Company, the Gilchrist Transportation Company, or some other transportation company covering that entire tonnage at a stated rate of freight to the different ports where we expect to ship. Then we notify these companies, whichever one we may select, that on a certain date we desire to load a cargo. They report to us the name of the vessel, if they have one.

Immediately upon the receipt of that report we fill out what we call a charter confirmation, giving the capacity and name of the vessel, where to load, and to what destination she is to go, the rate of freight and any other information that may be necessary, what kind of a vessel, where the vessel is to report for fuel, and whatever instruction may be necessary with reference to the vessel.

Mr. Duncan: What is that last statement about reporting for fuel?

Mr. Maurer: Whether she reports for fuel or not and where the vessel is to report for fuel.

Mr. Duncan: What fuel?

Mr. Maurer: Her own fuel.

And thereupon, blank form of charter confirmation is offered and admitted in evidence on behalf of the complainant and is hereto attached marked Exhibit No. 47 and made part hereof.

98 Mr. Hogsett: Right in that connection, Mr. Maurer, let me ask you whether or not there is any portion of that coal delivered to the purchasers f. o. b. vessel at Huron?

Mr. Maurer: Practically all delivered to the purchasers f. o. b. vessel at Huron, although you may make a price at the other end, but as far as our shipments are concerned, we nearly always make them f. o. b. Huron or Cleveland.

Mr. Hogsett: Then where is it delivered f. o. b. vessel at Huron, those orders are orders given to the vessel owners?

Mr. Maurer: Yes; we call it a charter confirmation.

Mr. Hogsett: You do that for the purchaser of your coal?

Mr. Maurer: Yes; we do that for the purchaser of the coal. We charter the boats. We sometimes agree in selling the coal that we will take care of the charter. That is ordinarily the case that we will take care of the furnishing of vessels and the chartering.

Mr. Hogsett: You mean by furnishing the vessel, making the arrangement with the vessel owner?

Mr. Maurer: Yes.

Mr. Hogsett: For the use of the vessel to ship the cargo in?

Mr. Maurer: Yes; to ship the cargo in.

Mr. Hogsett: Now, right at that point, is there any common arrangement or control between the Wheeling & Lake Erie and the vessels?

Mr. Duncan: We object to the question because it calls for a conclusion, and if the witness knows anything about it let him state the facts.

Commissioner Hughes: It is proper that he should state the facts.

Mr. Hogsett: What if anything does the rail shipment have to do with, or what connection has the rail shipment with the water movement?

Mr. Maurer: Absolutely none whatever.

Mr. Hogsett: What relation is there, if any, between the rail carrier and the water carrier?

Mr. Maurer: None whatever.

Mr. Hogsett: They are under a separate contract entirely?

Mr. Maurer: Yes.

Mr. Maurer: If the Commission will let me go on, I can explain the whole transaction. After the vessel is loaded sometimes the Wheeling & Lake Erie call up and notify us that the boat has cleared and has been loaded with so many tons of coal, but ordinarily we wait
99 until we get a report of this kind (producing same) from the dock superintendent at Huron showing the boat, the date she was loaded and the number of cars and the tonnage.

Mr. Duncan: Are you offering that in evidence?

Mr. Hogsett: We will offer it.

Mr. Maurer: Upon the receipt of that notice usually the first thing to do is to insure the cargo. Then we make out a bill of lading in this form (producing same) showing the destination, showing the name of the boat, showing the number of tons and the kind of coal, the rate of freight, consigned by ourselves as the consignor.

Mr. Hogsett: The lake freight, you mean?

Mr. Maurer: Yes; the lake freight. Then we mail this bill of lading to the consignee at Ashland to Duluth, as the case may be, mailing him two or three copies of the bill of lading, one of which he hands to the captain of the boat on his arrival there, and on that bill of lading the captain collects the freight. Sometimes that is done at the other end and sometimes at this end.

Commissioner Hughes: Is the coal that you land on the dock there always sold before you land it?

Mr. Maurer: No; it may be shipped and sold afterwards. When anybody wants a certain amount of coal we take it out of the bunch. There may be three or four or five hundred cars of coal there, and somebody calls up and says "we want five hundred of this" or "six hundred of that grade of coal."

Commissioner Hughes: That coal then is subject to reconsignment?

Mr. Maurer: Yes.

Commissioner Hughes: And may be sold after it is delivered on the dock.

Mr. Maurer: Part of it may be sold. Sometimes we have a bunch sold before hand.

Commissioner Hughes: But it is not necessarily sold before?

Mr. Maurer: Not necessarily sold.

Mr. Duncan: That is the practical situation though, isn't it? As a matter of fact you have most of it sold at the commencement of the season?

Mr. Hogsett: Do you want to cross-examine now?

A. I will wait a while for you if you do.

Mr. Duncan: Why are you so testy about it.

And thereupon, the blank form of bill of lading last above referred to is offered and admitted in evidence on behalf of the complainant and is hereto attached, marked Exhibit No. 47¹/₂ and made part hereof.

100 Mr. Hogsett: Mr. Maurer, you were saying something yesterday afternoon about insurance taken out on the cargo coal. Will you state to the Commission how that is done. Who takes it out and for whose account and benefit is it taken out?

Mr. Maurer: If the coal is sold F. O. B. vessel Huron we take it out for the consignee, for and on account of the consignee.

Commissioner Gothlan: When the tariff formerly read f. o. b. dock did the consignee then get a loading cargo?

Mr. Maurer: On some of the roads it is f. o. b. dock now.

Commissioner Gothlan: Who pays the loading charge, the shipper or the consignee?

Mr. Maurer: On the Pennsylvania road in Cleveland we pay the loading charge. Then at the end of the season all the charges of the dock company are turned over to Mr. Greist the auditor of the Pennsylvania Company, who goes over them and O. K.'s them, then the dock company rebates to us whatever the difference is between the figures we pay and the figures Mr. Greist adopts. They run from probably $33\frac{1}{2}$ cents per ton up to 6 cents.

Commissioner Gothlan: That is when the rate reads f. o. b. docks?

Mr. Maurer: Yes. Some of those docks are leased by the railroad companies to other parties who operate the docks. And in a case of that kind we pay the dock companies and ordinarily the railroad company dictate how much they shall charge.

Mr. Duncan: That is, they reimburse the shippers what is presumed to be an equitable profit made out of the operation of the dock?

Mr. Maurer: Yes.

Mr. Duncan: So that the shippers should not be charged an exorbitant rate for unloading from the dock to the vessel?

Mr. Maurer: Yes, last year it averaged on the Pennsylvania below five cents per ton.

Mr. Hogsett: Now, Mr. Maurer, you may state whether or not you dispose or sell any of this coal after it has been taken to Huron?

Mr. Maurer: We dispose of a great deal of it after it has been taken to Huron.

Mr. Hogsett: Do you reconsign any of the coal either en route or after it gets there to other points than Huron, in Ohio?

Mr. Maurer: Never after the——

Mr. Hogsett: I mean do you divert it?

101 Mr. Maurer: I was answering the question. Never after it gets to Huron because in order to divert to other points on the Pennsylvania it would of necessity have to go back to Norwalk. But any coal that is on the siding prior to reaching Norwalk we frequently divert to other points.

Mr. Hogsett: You mean on the Wheeling & Lake Erie?

Mr. Maurer: Yes, sir.

Mr. Hogsett: You said on the Pennsylvania.

Mr. Maurer: I meant the Wheeling & Lake Erie. I said after it arrived at Huron it would of necessity have to go back to Norwalk to reach other points.

Mr. Hogsett: Do you know what the rate is to Kelley's Island?

Mr. Maurer: The vessel rate?

Mr. Hogsett: Yes, the vessel rate to Kelley's Island.

Mr. Maurer: I do not.

Mr. Hogsett: How about the vessel rates changing from time to time.

Mr. Maurer: Vessel rates practically change every season—I mean through the season they change.

Mr. Hogsett: Now take the coal shipped from the mines to Huron, your charge is how much; that is, your rate is how much?

Mr. Maurer: 90 cents f. o. b. vessel.

Mr. Hogsett: When it arrives at Huron and is delivered to the consignee—that is your company f. o. b. vessel, when with reference to that time do you pay the freights to the Wheeling and Lake Erie here for the rail haul?

Mr. Maurer: The Wheeling & Lake Erie usually render a bill about from the 10th to the 15th of the succeeding month. Their bills cover the statement of the coal loaded on each vessel; the car numbers and tonnage at 90 cents.

Mr. Hogsett: Now when the coal is taken from the mines and delivered at Huron and payment made, what if anything does the Wheeling & Lake Erie Railroad have to do with that coal after that time?

Mr. Maurer: Delivered on the boat to you, or to your order?

Mr. Maurer: Nothing whatever.

Mr. Hogsett: That transaction then, so far as the Wheeling & Lake Erie is concerned is closed?

Mr. Maurer: Absolutely closed.

Mr. Hogsett: Now what if anything has the Wheeling & Lake Erie to do with the coal from the time it is shipped other than to take it to Huron and there deliver it on board the vessel or otherwise as you may direct?

Mr. Maurer: Nothing whatever.

Commissioner Gothlan: Where is your coal way billed from?

Mr. Maurer: Dillonvale.

Commissioner Gothlan: Have you ever seen a copy of your way bill?

Mr. Maurer: I do not believe I have. They make out their own way bills. On the Pennsylvania we make out the way bill and on the Wheeling & Lake Erie their agent makes out the way bill themselves. I find pinned to one of these papers a copy of their commercial way bill.

Commissioner Gothlan: You have not seen one of them yourself?

Mr. Maurer: No, sir.

Mr. Duncan: I had one but I found on looking for it yesterday I did not have it with me.

Mr. Hogsett: Then when the coal is delivered to you at Huron you there in some instances at least deliver it to the person or company to whom you make the sale of coal, who receives it; the person then receiving it on board the vessel.

Mr. Maurer: Yes.

Mr. Hogsett: And that is done under a separate contract—independent contract between the vessel carrier and the shipper whether it be yourself or the purchaser from you and to whom you deliver on board at Huron?

Mr. Duncan: We object to the form of the question, if the Commission please. Let the witness state the facts and the Commission can draw its own conclusion as to whether it is a separate arrangement.

Commissioner Hughes: The form of the question might be objectionable as suggesting the answers to the witness. Let the witness state the facts.

Mr. Maurer: I think I said yesterday that ordinarily we contract with the vessel owners, or the vessel shippers—I should say lake shippers for approximately our lake tonnage that we figure on shipping for the season. That sometimes does not cover the shipment and sometimes it is beyond the shipment. This is a contract entered into between the Glens Run Coal Company and the Transportation companies.

Mr. Duncan: Is that contract in writing?

Mr. Maurer: Yes, usually is. The form of the contract is in a letter. We write a letter to say that the United States Transportation Company confirm what is a verbal arrangement showing the number of tons, the rate, and the rate to certain points on the lake, covering Milwaukee, Duluth, Ashland and possibly Canadian ports, and Port Huron, and I might add they reply to that letter accepting that much tonnage which constitutes ordinarily the contract our company makes for the lake carriage.

Mr. Hogsett: That is the way some of your coal is disposed of?

Mr. Maurer: Yes.

Mr. Hogsett: Some portion of it is sold during the season and delivered from the coal that you have accumulated or assembled at Huron?

Mr. Maurer: We estimate, as I said before, the tonnage. When I say tonnage that does not mean the tonnage we sell but the tonnage we figure we will be able to ship and be able to dispose of. This tonnage may not be over two thirds sold but we simply figure what we will probably sell and we have the coal; we cover sufficient coal to take care of that.

Mr. Hogsett: That is merely an estimate of what you may be able to sell during the season?

Mr. Maurer: Merely an estimate.

Mr. Hogsett: Then your shipments to Huron, the assembling point of your coal, is based upon what you estimate you may be able to dispose of during the season?

Mr. Maurer: Yes, sir.

Commissioner Gothlan: Going back for a minute, there is one point the commission is not clear on. I believe you stated you shipped to the port right along whether you have orders or not?

Mr. Maurer: We always keep a quantity of coal on the dock provided we have any lake shipments whatever.

Mr. Arnold: That is you have the cars on the dock?

Mr. Maurer: We keep the cars on dock or substantially on the dock; they are along the line of the railroad some place.

Commissioner Gothlan: Briefly what is the reason you ship that way instead of waiting until you have orders for the coal?

Mr. Maurer: In order to have the coal. It is a large quantity ordinarily that you sell at one time. For example a boat of ten thousand tons capacity—an order for ten thousand tons would require a boat of that capacity. To accumulate that much coal and take care of your business unless you had a very large mine would mean three or four weeks before you could accumulate it.

Commissioner Gothlan: You anticipate that?

104 Mr. Maurer: Yes, we anticipate that. And we ship that what we term our surplus coal. For example we are running to-day and we have ten cars left over and if we had no consignee in Ohio or other points that surplus would go to the lakes to await orders for shipment up the lakes. But you understand we have orders. We have a certain tonnage sold all the time.

Mr. Arnold: Still quite often such shipments were made when there are no sales for lake shipment at all?

Mr. Maurer: Yes. Simply to get rid of the coal, without the sign of an order.

(Here follows Exhibit No. 46, marked page 104½.)

EXHIBIT NO. 46 The Glen's Run Coal Company.
Statement of Coal Loaded and Shipped May 4th, 1909.

Edge - 1 & 2 Mine.

Order No.	Car Initial No.	Weight	Size	Consignee	Destination.	Route	Amount of	Freight per ton.
W & L E	M 774	50,000	1-4	Carbon Pessied Brick Co.	Cadon, O.	M. C. R. R.	30.124	
	4029	33,200	"	W. A. L. E. R.	Columbus, Ohio.			
"	41272	33,100	"	W. A. L. E. R.	Shawnee, Ohio.			
"	10902	33,700	"	W. A. L. E. R.	Shawnee, Ohio.			
"	33065	87,400	"	The Glen's Run Coal Co.	Huron, Ohio.			
"	11826	33,100	"	The Glen's Run Coal Co.				
"	16925	34,700	"	The Glen's Run Coal Co.				
"	90358	53,800	"	The Glen's Run Coal Co.				
"	10087	54,800	"	The Glen's Run Coal Co.				
"	8544	52,400	"	The Glen's Run Coal Co.				
"	10148	54,000	"	The Glen's Run Coal Co.				
"	10280	53,400	"	The Glen's Run Coal Co.				
"	51503	53,500	"	The Glen's Run Coal Co.				
"	42069	76,300	"	The Glen's Run Coal Co.				
"	20311	53,300	"	The Glen's Run Coal Co.				
"	51208	53,200	"	The Glen's Run Coal Co.				
"	11828	54,900	"	The Glen's Run Coal Co.				
"	10333	72,300	"	The Glen's Run Coal Co.				
"	11312	53,000	"	The Glen's Run Coal Co.				
"	11302	53,000	"	The Glen's Run Coal Co.				
"	10757	53,700	"	The Glen's Run Coal Co.				
"	85383	54,500	"	The Glen's Run Coal Co.				
"	90949	54,500	"	The Glen's Run Coal Co.				
"	8747	53,600	"	The Glen's Run Coal Co.				
"	95099	52,500	"	The Glen's Run Coal Co.				
"	11825	53,800	"	The Glen's Run Coal Co.				
"	14775	87,600	"	The Glen's Run Coal Co.				
"	50130	87,000	"	The Glen's Run Coal Co.				
"	10741	60,200	3-4	The Glen's Run Coal Co.				
"	20122	87,000	"	Carriage Steel Co.				
"	53175	53,500	"	Carriage Steel Co.				
"	34212	97,000	"	Carriage Steel Co.				
W & L E	30732	54,000	3-5	W. A. L. E. R. Co.				
W & L E	20015	54,000	3-5	W. A. L. E. R. Co.				
"	41913	87,500	R of M	Colliers Union S. Dubell				
"	47143	87,500	R of M	National Tube Co.				
"	20149	87,500	"	National Tube Co.				
"	20591	88,100	"	National Tube Co.				
"	43596	84,200	Slack	National Tube Co.				
"	50521	84,100	"	National Tube Co.				
"	50059	84,800	"	National Tube Co.				
"	50008	84,500	"	National Tube Co.				
"	43770	81,000	"	National Tube Co.				
"	50162	83,700	"	National Tube Co.				
"	47474	83,500	"	National Tube Co.				
"	41505	80,000	Cop	National Tube Co.				
								per ton.

Columbus, Ohio.



105 EXHIBIT No. 47.

Charter Confirmation.
Office of The Glens Run Coal Co., Rockefeller Building.

No.....

CLEVELAND, O.

Confirming our charter made this day, you are to place the
..... capacity tons
to loadfor account.....
with soft coal at.....for.....
Vessels to report.....Steamer to fuel with
..... coal
Rate of freight
Remarks

THE GLENS RUN COAL COMPANY,

By

EXHIBIT No. 47½.

No.....

OHIO,, 190..

Shipped by The Glens Run Coal Co. in good order and condition,
on board the, the following articles, marked
and consigned as per margin to be delivered in like order and con-
dition (the dangers of navigation only excepted), as addressed on
the margin, subject to freight and charges as below.

In Witness Whereof, the Master of said vessel hath signed
..... Bills of Lading of this tenor and date.
Tons Coal

Freight per ton, free in and out to vessel.

Mr. OSBORNE, a Number Eight Ohio Operator called as a witness
by the complainant:

Mr. Hogsett: State to the Commission how that is done?

Mr. Osborne: For the sake of handling our coal with the least
possible trouble and expense to the railroad, we take some of our
office men and while—we perhaps do it a little different from some
of the rest, because we ship a great deal of Pennsylvania coal and
other Ohio coals to the lake front, and we will take one man, if you
please, and consign him to a certain port—take Lorain. We will
send, say S. H. Robbins, who will take all of those grades
106 of coal consigned to that point. He will take lump, run
of mine, nut or slack, which ever it may be. When we
order the boats we will order—give notice to the railroad that, for
instance the Hiawatha will be for loading about such a date. Some-
times it is a little shorter than that time and sometimes it

overruns—depends upon the speed of the unloading of the boat and tell them that S. H. Robbins for three-quarter, and they will get that coal ready—giving them sufficient time to run it down to the docks, so that they can handle the coal at the best possible operation for them and the least delay to the boat possible.

Mr. Hogsett: Prior to the loading of that boat, the coal from the various mines is assembled at these lake ports. There subject to sale and subject to such disposition and shipment as the coal company and coal operators may desire.

Mr. Duncan: We object to the form of the question as leading. Commissioner Hughes: The question, of course, is leading.

Mr. Hogsett: Well, the only object to a leading question is when you have a willing witness.

Mr. Hogsett: State those conditions.

Mr. Osborne: We take our coal—in the first place we fill up our mines with orders that we may have to deliver—of rail orders. Then the surplus of those different grades of coal we may order to the lake front and it is just about on the same line as pouring in from four or five different mines, different streams into a tub, and then, as we want a cargo of coal, we take an order out of that tub—a dipper full of whatever we want for the boat and the freight we pay to the lake front, and the vessel arrangements we make either by direct contract with the vessel concerned or we take a chance—what I mean by a chance, we keep out a certain percentage of our coal that is not contracted with any boat line and then we utilize a spot boat. For instance, that tub is getting full. The Railroad company is going to shut off that coal running in there. So if we can get a spot boat, we rush it out and dip it out and let it go on.

Mr. Hogsett: When this coal is shipped from the mines it is consigned, as you have stated, to some person in the employ of your company?

Mr. Osborne: Be consigned to one of our employes with the understanding *that* the railroad company that it is our coal when we pay the freight.

167 Mr. Hogsett: At the time it is shipped from the mines does your company know where any particular car load or train load of coal will finally go?

Mr. Osborne: Absolutely no; absolutely not. Unless it would be some time that there was a boat at the dock and a shortage of coal, then we would be after the railroad to rush that coal; that is a very exceptional case now because there is plenty of coal at the lake front.

Mr. Hogsett: This coal is delivered to the purchaser, your purchaser, where, usually?

Mr. Osborne: When we purchase coal?

Mr. Hogsett: No, to the purchaser.

Mr. Osborne: Well, we do that anyway the fellow will take it; give him any kind of medicine he wants on it. The coal is sold very largely f. o. b. boat at the lake front and that is all the basic price is, your coal f. o. b. at the lake front. Sometimes we will sell

a man a block of coal at the lake front and he will request us to take a charter. We will take a chance on it or we may contract his coal.

Mr. Hogsett: Does it ever occur that your company purchases from another company coal that it has assembled or accumulated at the lake front, either Huron or Cleveland or these other ports?

Mr. Osborne: Yes, we have purchased coal at the lake front—purchased from different roads, among them the Wheeling & Lake Erie. I think we purchased some this spring from the Wheeling & Lake Erie at the lake front, number eight field coal.

Mr. Hogsett: That is you mean you purchased from the Wheeling and Lake Erie shippers?

Mr. Osborne: Yes, sir; Wheeling & Lake Erie road shippers.

Mr. Hogsett: Not purchased from the Wheeling & Lake Erie Railroad Company?

Mr. Osborne: No, sir.

(1268-1271.)

Mr. Hogsett: Now you said something about purchasing coal from Wheeling shippers?

Mr. Osborne: Yes, sir.

Mr. Hogsett: Was that coal that had been shipped to the lake port?

Mr. Osborne: That had been shipped to the lake port?

Mr. Hogsett: Had it been sold when it was shipped?

Mr. Osborne: No, sir; they solicited us to take it and we bought it at a very cheap price, an inducement to move it.

108 Mr. Hogsett: How much was there of that, Mr. Osborne, do you remember now?

Mr. Osborne: My recollection when they called up they had about five thousand tons and we told them if they would increase the cargo up to the point that we could get a boat for it, I think in the neighborhood of six to seven thousand tons, we would take it.

Mr. Hogsett: Now, Mr. Osborne in the shipments of this coal from the mines and in the shipments subsequently made by boat I will ask you to state whether or not there is any connection at all between the rail carriage and the water carriage?

Mr. Duncan: I object to the form of the question, particularly in view of the fact that the witness has already stated the circumstances and conditions under which this coal moves from the No. 8 field to the northwest.

Commissioner Hughes: If the witness is qualified to answer he may answer. There might be some objection to the form of the question but the witness may answer.

And, thereupon the Commission overruled the above objection of the defendants to which ruling of the Commission the defendant excepted.

Mr. Osborne: There is no connection whatever. It is absolutely our coal. We pay the freight rates, the lake freight and make our own vessel arrangement and everything.

Mr. Duncan: I move that the first part of the answer "there is absolutely no connection" be stricken out.

Commissioner Hughes: The answer may remain in the record.

Mr. Duncan: Note an exception.

(1289-1291.)

Mr. Duncan: Now what you say that you do not know where the coal is to go that comes from the mine you mean you do not know to what point in the northwest each particular car of coal that is sent up to this bucket or tub at the lakes is to go?

Mr. Osborne: Either that or train load.

Mr. Duncan: Or train loads?

Mr. Osborne: Yes, sir.

Mr. Duncan: But you are pouring it all into the tub?

Mr. Osborne: Sure.

Mr. Duncan: To be taken out?

Mr. Osborne: Yes.

Mr. Duncan: And distributed in the northwest?

Mr. Osborne: To be taken to our dock or some other places on some other order that may come in.

109 Mr. Duncan: It does not of necessity go to the northwest does it?

Mr. Osborne: No, no.

Mr. Duncan: Well all of the coal that goes in there that takes the lake rate goes to the northwest, doesn't it?

Mr. Osborne: No, some of it goes to Detroit, some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Mr. Duncan: You pay the local rate if you divert it?

Mr. Osborne: Yes and take your demurrage charges too.

Mr. Arnold: Go to the Islands in Lake Erie—

Mr. Osborne: No—Kelly's Island you mean?

Mr. Arnold: Yes.

Mr. Osborne: I have none of that order.

Mr. Arnold: If any of that coal was sent from Huron to Kelly's Island it would take the same lake rate?

Mr. Osborne: Sure if it would go into the river and be sunk it would take the same rate.

Mr. Arnold: I mean for shipping from lake ports to other points in Ohio it would still take the lake rate?

Mr. Osborne: Yes any point in Ohio.

Mr. Arnold: That is all.

(1306-1307.)

B. A. WORTHINGTON, Receiver of Wheeling & Lake Erie Railroad.

Mr. Hogsett: Mr. Worthington, has the Wheeling & Lake Erie Railroad Company, or you, as Receiver of that Company any contract or arrangement for the transportation of this lake coal with any lake carrier?

Mr. Duncan: I object to the question as incompetent, irrelevant and immaterial.

Commissioner Hughes: The witness may answer the question.

Mr. Duncan: I object upon the further ground that the question is objectionable as to form in that it assumes the existence of a contract.

And thereupon the Commission overruled the above objection of the defendants, to which ruling of the Commission the defendants excepted.

Mr. Worthington: No contract excepting the tariff rate of ninety cents F. O. B. vessel.

Mr. Hogsett: Is that with the lake carriers?

Mr. Worthington: No, that is with the shipper. The shipper furnishes the boat into which we load the coal.

Mr. Hogsett: I am asking you whether or not you have any contract with the lake carrier?

110 Mr. Duncan: I object to that question. The witness certainly cannot characterize the arrangement.

Mr. Hogsett: If there is no arrangement he can say so.

Mr. Duncan: He says none as evidenced by the tariff.

And thereupon the Commission overruled the above objection of the defendants, to which ruling of the Commission the defendants excepted.

Question read.

Mr. Worthington: Not that I know of.

Mr. Hogsett: Well, you are in the management and control of the property and you know what the contracts are, don't you?

Mr. Worthington: No; the shipper furnishes the boat and the shipper makes his own arrangements for shipping coal by vessel to the lake and our tariff is ninety cents F. O. B. vessel, and when he give us instructions, we load the coal onto the boat and he charts the boat or makes his own arrangements for shipping the coal up to the head of the lakes.

Mr. Hogsett: There is no arrangement between your railroad and the lake carrier?

Mr. Worthington: Not directly.

Mr. Duncan: I object to the form of the gentleman's question. I do not know whether he means a direct arrangement or an indirect arrangement.

Mr. Worthington: No direct arrangement.

Mr. Hogsett: What do you mean by "no direct arrangement"?

Mr. Worthington: Well, if the fact that the shipper furnishes the boat and arrangements to contract for the boat is not an indirect arrangement, why we have no arrangement.

Cross-examination by Mr. DUNCAN:

Mr. Duncan: The rate F. O. B. Vessel requires the shipper to furnish the vessel?

Mr. Worthington: Yes, sir.

Mr. TITUS, Assistant Superintendent Wheeling & Lake Erie Railroad.

Mr. Maurer: In 1907 there was a demurrage charge, wasn't there, and in 1908?

Mr. Titus: No; in 1907 there was a so-called demurrage charge, yes.

Mr. Maurer: While you are on that subject, you may state what that was.

Mr. Titus: It was an average of seven days. The amount of coal we were loading at that time, with an average of seven days, 111 we would have had about 6,000 cars of Lake coal.

Mr. Maurer: Explain what the seven days' demurrage was, so that the Commission may understand it?

Mr. Titus: Well, the average was seven days.

Mr. Maurer: The average of what; explain it so that the Commission will understand it.

Mr. Titus: To make it short, if you loaded two hundred cars on a boat, some of those cars might have been delayed thirty days, and some of them twenty, and some of them five, and the average of those two hundred cars was not to be over seven days; otherwise there was a demurrage.

Mr. Maurer: That is, if you brought two hundred cars to the lake, and one hundred of them were loaded at the end of fourteen days and the other hundred got there the day they were loaded, there would be no demurrage?

Mr. Titus: None whatever.

Mr. Maurer: That made the average of seven days?

Mr. Titus: Yes.

Mr. Maurer: What was the charge per car, Mr. Titus?

Mr. Titus: One dollar a day.

Mr. Maurer: And that one dollar was extra, beyond the rate?

Mr. Titus: Yes.

Mr. Maurer: For every day?

Mr. Titus: Yes.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling and Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO et al., Defendants.

Certificate.

UNITED STATES OF AMERICA,

Northern District of Ohio, ss:

I, B. C. Miller, Clerk of the Circuit Court of the United States within and for said district, do hereby certify that the foregoing is a

full, true and complete transcript of the testimony in the above entitled cause, taken before and written out by me, in open court, under the 67th rule in equity, as amended, and pursuant to the order of the court.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court, at the City of Cleveland, in said district this 25th day of June A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk*.

112 UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, Robert W. Tayler, United States District Judge within and for said district, sitting in the Circuit Court, do hereby certify that the foregoing is all the testimony taken in open court on the hearing of the above entitled cause before me, written out by B. C. Miller, Clerk, and ordered to be made a part of the record in said cause.

ROBERT W. TAYLOR, *Judge*.

(Endorsement:) No. 7961. B. A. Worthington, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. Testimony. Filed June 25, 1910. B. C. Miller, Clerk. U. S. Circuit Court, N. D. O.

In the Circuit Court of the United States, Northern District of Ohio,
Eastern Division.

No. 7961.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant.

vs.

RAILROAD COMMISSION OF OHIO et al., Defendants.

Opinion.

TAYLER, J.:

The complainant brings this action against the Railroad Commission of Ohio, the Pittsburgh Vein Operators' Association of Ohio, its officers and members, and attacks the validity of an order made by the Railroad Commission, upon complaint of the Operators' Association, finding the complainant's rate on coal from the No. 8 District of Ohio, to Huron and Cleveland, Ohio, f. o. b. vessel (known as "lake-cargo coal"), to be unreasonable and unjust, and fixing a rate of seventy cents f. o. b. vessel as the maximum rate to be charged by the complainant for the statutory period provided by the Ohio Railroad Commission Act. The order was served upon the complainant the 23rd day of March, 1910, and, under the provisions of section 14 of said act (R. S. 244-24-) takes effect and becomes operative of its own force within thirty days after service thereof, but through counsel

representing the Railroad Commission it was agreed that no action should be taken under the order pending a decision by this court.

The matter is now before this court on a motion for a temporary injunction. So much of the evidence given before the Railroad Commission as is pertinent on the question involved is, by agreement, to be considered as though presented by affidavits on this hear-
113 ing.

The questions presented and argued, although there are other grounds for relief set forth in the bill of complaint, arise on the claim of the complainant that the lake-cargo coal rate is an inter-state rate, and that the Railroad Commission of Ohio is without jurisdiction to make the order referred to.

It appears that bituminous coal, such as is mined in the No. 8 District, is classified by the complainant, for tariff purposes, as (a) railway fuel, being coal sold to railroad companies; (b) lake-cargo coal, that is, coal intended for shipment by lake to points in the Northwest; and (c) commercial coal, comprising coal for commercial and domestic use, not included in the first two classes.

The No. 8 Coal District of Ohio is situated in Jefferson, Harrison and Belmont Counties, and the members of the Pittsburg Vein Operators' Association of Ohio are interested in mining coal in that district. The traffic is large, about 400,000 tons of lake-cargo coal being shipped over the complainant's railroad from that district in 1909, and trans-shipped by vessel to points in the Northwest.

At and prior to the time of the complaint being lodged with the Railroad Commission by the Operators' Association, the tariff rate in force on the complainant's railroad on lake-cargo coal from the No. 8 District to Huron and Cleveland, Ohio, f. o. b. vessel, was ninety cents per ton. The rate covers, in addition to the rail transportation, the service of unloading the coal from the cars into vessels and trimming it in the holds of the vessels, so that they can safely proceed.

The rate on commercial coal to Huron or Cleveland is \$1.00 per ton.

The vessels for lake-cargo coal are generally furnished by the operators, but the coal is sometimes sold f. o. b. vessel, the title to the coal in that case passing to the purchaser upon being properly loaded into the vessel.

The coal in question is shipped from the mines to Huron or Cleveland, principally Huron, where the complainant has large dock facilities and expensive machinery and appliances for unloading coal into vessels, during the season of navigation, simply marked "Lake coal" consigned to the operator, or to some office employé whose name is used as a mere matter of convenience for the purpose of designating a particular grade of coal. The operator notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a particular grade of coal. The railroad then picks up such cars of the operator's coal as are necessary to fill the cargo and moves them
114 on to the dock alongside of the vessel, loads the vessel, trims or distributes the coal properly in her hold, and furnishes the shipper with a cargo statement showing the car numbers and

weights and total tons of coal in the vessel, on which information the bill of lading for the vessel shipment is made out.

It appears that all the coal shipped at the lake-cargo rate remains on the cars of the complainant until unloaded into a vessel, unless it should be diverted en route and devoted to some other purpose, but in that case the lake-cargo rate does not apply. For instance, if it should be diverted to commercial use at Huron, the rate on commercial coal, which is \$1.00 a ton, would govern.

There is testimony to the effect that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what particular ultimate destination it will go, and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, but it is subject to demurrage charge if it remains on the cars beyond a specified time.

All coal thus loaded in vessels is, and must practically be, carried to points in other States—or to Canada. The lake ports in Ohio receive coal by rail from interior points, but not by boat from other Ohio ports. It might be that a quantity of coal, so small as to be negligible, is unloaded on one of the Ohio islands in Lake Erie, but no substantial importance is claimed for this circumstance nor could be given to it.

The complainant claims:

1. That the rate in question is applicable only to coal moving in interstate commerce from mines in the No. 8 District to points outside of the State of Ohio, via lower lake ports and then by vessel up the Great Lakes.

2. That it is the well understood intention of all the parties, the complainant, the operator and the vessel carrier, to engage in interstate commerce; that the lake-cargo rate is not applicable where the total is not sent by vessel to points outside of the State of Ohio, and that it is a "proportional rate," made for the purpose of allowing the operators of the No. 8 District to secure, in effect, a lower through rate.

3. That the contract between the operator and the complainant is not completed until the railroad has loaded and trimmed the vessel, and that, when loaded, the vessel must naturally take the coal to some point outside of the State of Ohio, and that such loading and trimming is, therefore, a part of the interstate commerce engaged in by the vessel owner, the coal operator and the complainant in the transportation of lake-cargo coal; and that, even if the coal
115 does change title upon delivery f. o. b. vessel, it has already started on its interstate journey.

4. That while lake-cargo coal may be reconsigned or diverted to other purposes, when that is done the coal loses its character as lake-cargo coal and becomes subject to a new contract with a different rate, and that such incident can have no effect in determining the character of the original shipment.

The defendants contend:

1. That the carriage contracted for between the operator and the complainant is one that begins and ends in Ohio; that the coal is mined and loaded on cars in Ohio and is delivered on board a vessel in Ohio, and that, therefore, the shipment is an intrastate one.

2. That there is no disclosed intention to engage in inter-state commerce, as, when the coal leaves the mine, it is known what boat will take it or to what point it will go, whether it will be delivered en route, or interchanged with other operators at Huron, and that some of the coal shipped from the mines at the lake-cargo rate is in fact ultimately delivered to points in the State of Ohio.

3. That no arrangement of any kind as to the through rate exists between the rail carrier and the vessel carrier, and that the contract with the complainant is ended and complete when the coal is loaded on and trimmed in the vessel and is independent of and has nothing to do with the contract with the vessel carrier, which may be made by either the operator or the purchaser of the coal.

4. That the Interstate Commerce Commission has no jurisdiction of the rate for the traffic in question because there is no "common control, management or arrangement for a continuous carriage or shipment" between the rail carrier and the water carrier.

It seems to me that a consideration of the facts can lead to no other conviction than that this lake-cargo coal has, when started on its journey, taken on the character of inter-state commerce; the rate itself is fixed as an inter-state rate; it is ninety cents only if and because there is to be a further transportation into another State at a rate which is fixed in consequence of a rate which the complainant charges.

The complainant receives the ninety cents for (a) carrying the coal to the lake (b) loading in on a vessel which intends to, and must practically, carry the coal to some Northwestern port, and (c) trimming the coal in the hold so that it will carry safely.

The loading and trimming are done for no other purpose than to contribute that much to the transportation to another State; 116 in the sense of commerce as it is and must be carried on, it is mere sophistry to say that it might be unloaded at some other Ohio port; business could not be done as business, and is not done, in that way. But even if it were so done, it would immediately lose its character as lake-cargo coal and become subject to the rate on commercial coal, namely, \$1.00.

It is insisted that, with respect to this coal, there is no common control, management or arrangement for a continuous carriage or shipment between the rail carrier and the water carrier, as provided in the Interstate Commerce Act, and that without this there can be no inter-state character given to the coal. As to this the answer is that when the railroad agrees to haul and load for ninety cents, as against a higher rate when not destined to another state, there is made, in effect, an arrangement between the rail carrier and the water carrier. It is not made with some particular water carrier, but it is made with whatever water carrier the operator arranges with to take the cargo. The ninety-cent rate does not become effective except in connection with some rate which is made by a water carrier, for it is not lake-cargo coal unless loaded on a vessel and carried to a Northwestern port by the lake carrier.

The fact that it is a "proportional rate" of a longer haul rate both

characterizes the rate and the business and also implies the arrangement to which the statute refers.

The situation would, I think, be more easily defined if we were discussing the question as to whether the railroad company had a right to deny the jurisdiction of the Interstate Commerce Commission to deal with the rate and was insisting that it was subject only to regulation by the State. The device of giving a rate on coal through to the hold of a vessel, which could necessarily carry it only to another State, when it had a higher rate if left at the port and was not loaded on a vessel, would properly be said to be a mere subterfuge.

The claim that the mere purpose of the shipper or of others to ship it beyond the limits of the State does not make it interstate commerce is true, and the argument would be sound in this case if the rate was the same as on other coal and it was unloaded on the dock at Huron or Cleveland. But this case is radically and characteristically different from that; the intention and the rate and the physical condition and position into which the railroad places the coal all concur in giving an interstate quality to the commerce.

Why does the railroad company make a rate for lake-
117 cargo coal less than the rate to the same port? It can only be because there is to be an additional haul of that coal. It cannot be legally justified on any other theory. It would be unlawful, in view of the rate on "commercial" coal, to give a ninety-cent rate on board a vessel if the journey that that coal was to take was then completed.

But, as I have before said, not only does it mean that there is to be an additional transportation of that particular coal, but in case of coal delivered at Lake Erie ports on board vessels, it means necessarily transportation to a port in another State, and it is that which gives an interstate character to the coal which is under consideration and to the rate which is being discussed.

When we analyze and determine the real nature of the controversy between the complainant on the one hand and the State Railroad Commission and the operators on the other, we discover that the fact that lake-cargo coal has essentially passed into interstate commerce and that the ninety-cent rate is an interstate rate is the sole foundation of the contention of the operators and of the finding of the Commission that the rate ought to be reduced to seventy cents. They undertake to prove that the ninety-cent rate is excessive by showing the cost of transporting the cargo to the Northwestern lake ports and the expense of handling it there.

I find no reason to change my opinion as to the nature of this commerce and of this rate by a consideration of the cases cited by counsel for the Commission. Conclusive weight is sought to be given to *Gulf, etc., Ry. Co., vs. State of Texas*, 204 U. S. 403. The Supreme Court in that case carefully applied the sound rules of law to the facts which were there presented, and I see nothing in any declaration of the court there made which would tend to deny the soundness of the proposition that in this case lake-cargo coal, on which a rate of freight is fixed because it is lake-cargo coal, is to be dealt with as interstate commerce.

I, therefore, conclude that the Railroad Commission of Ohio has no authority to fix a rate at which lake-cargo coal, as defined in the present practice of railroad companies, should be carried, but that it is subject only to the authority of the Interstate Commerce Commission.

R. W. TAYLER.

May 31, 1910.

(Endorsement:) No. 7961. United States Circuit Court, Northern District of Ohio, Eastern Division. B. A. Worthington Receiver of The Wheeling & Lake Erie Railroad Company Complainant vs. Railroad Commission of Ohio et al., Defendants.
118 Opinion. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

(Final Decree.)

April Term, A. D. 1910, to-wit: June 25, 1910.

Present: Honorable Robert W. Tayler, U. S. District Judge.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company.

vs.

RAILROAD COMMISSION OF OHIO et al.

This cause came on to be heard upon the bill of complaint of the complainant, the answer of the Railroad Commission of Ohio, defendant, the replication of the complainant, and the testimony offered by the parties in support of their respective claims respecting the character of the commerce to which the lake cargo rate is applicable, and the court ordered the testimony to be taken in open court and reduced to writing by the clerk and made a part of the record which is accordingly done; and thereupon it was argued by counsel, and the court after due consideration and being fully advised in the premises finds with the complainant on the issues joined with reference to the character of such commerce and that the allegations of the bill of complaint respecting the character of the commerce to which the lake cargo rate is applicable are true, that the lake cargo rate involved in this controversy applies only to coal transported from a point in the State of Ohio, to wit, the No. 8 District to a point outside the State, and that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged by the complainant for the services rendered by said complainant in the transportation of said lake cargo coal;

Wherefore, it is Ordered, Adjudged and Decreed—

(1) That the order of the Railroad Commission of Ohio made and entered the 28th day of February, 1910, in proceeding pending before it wherein the Pittsburg Vein Operators Association of

Ohio was complainant and The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its Receiver, were defendants, and which said order is set forth in the bill of complaint and which purports to require The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its Receiver, to fix a rate of 70 cents per ton, F. O. B. vessels, on lake cargo coal from No. 8 District in Ohio to lake ports Cleveland and Huron, be, and the same is hereby void and of no effect.

119 (2) That the Railroad Commission of Ohio, its agents, attorneys, representatives and members be, and they and each of them are hereby perpetually enjoined and prohibited from instituting, authorizing or directing any suit, action or actions of either a civil or criminal nature or any proceedings against B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, or The Wheeling & Lake Erie Railroad Company, the object or purpose of which, or relief sought by such action being to put into effect or enforce any of the provisions of said order of the Railroad Commission of Ohio made the 28th day of February, 1910, respecting the rate on lake cargo coal or to subject the said B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, or The Wheeling & Lake Erie Railroad Company to any penalties for forfeitures for any failure to comply with said order under the statutes of Ohio made and provided, or from in any manner interfering directly or indirectly with the continuation of the present rate on the lake cargo coal from the No. 8 mines in Ohio to said lake ports at the present time in effect on the railroad operated by B. A. Worthington, as Receiver of The Wheeling & Lake Erie Railroad Company, or such other rate or rates as the said Receiver may from time to time put into effect.

The court in view of the foregoing finding and decree does not deem it necessary and has therefore given no consideration to the other matters set forth in the bill of complaint of the complainant and upon which the complainant further predicates his right to the relief prayed for, and which said other matters have been traversed in the answer of the Railroad Commission of Ohio, the finding and decree of the court in the present instance being based solely upon the fact that the commerce to which the rate applies is interstate commerce over which the Railroad Commission of Ohio has no power or authority.

To which finding, judgment, order and decree, the defendant Railroad Commission of Ohio excepts, and on application of defendant an appeal is allowed in open court. The appeal bond is fixed at \$250.00.

(Petition for Appeal.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
Railroad Company, Complainant,
vs.

RAILROAD COMMISSION OF OHIO, Defendant.

120

Petition for Appeal.

The defendant herein, the Railroad Commission of Ohio, feeling itself aggrieved by the final decree heretofore made and entered on the 25 day of June, 1910, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

RAILROAD COMMISSION OF OHIO.

By U. G. DENMAN,

Attorney General of the State of Ohio,

Attorney for Defendant.

FREMAN T. EAGLESON,

T. H. HOGSETT,

Of Counsel.

Dated June 25, 1910.

(Endorsement.) No. 7961. B. A. Worthington, Receiver, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. In Equity. Petition for Appeal. Filed June 25, 1910. B. C. Miller, Clerk. M. B. & H. H. Johnson, Cleveland, Ohio.

(Assignment of Errors.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, Defendant.

Assignment of Errors.

Comes now the defendant, the Railroad Commission of Ohio and files the following assignment of errors, upon which it will rely upon its prosecution of its appeal from the decree made by this Honorable Court on the 25 day of June, 1910, in the above entitled cause, and says; that the findings and decree in said cause are erroneous and against the just rights of said defendant for the following reasons:

1. That the court erred in its finding for the plaintiff on the issue joined with reference to the character of the commerce to which said lake cargo rate is applicable.

121 2. That the court erred in its finding that the lake cargo involved in this controversy applied only to coal transported from a point in the State of Ohio, to-wit: the Number Eight District to a point outside the state.

3. The court erred in finding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged by the complainant for the services rendered by said complainant in the transportation of said lake cargo coal.

4. Said court erred in not finding and holding, upon a consideration of all the evidence, that the movement or transportation of said Number Eight Lake coal from said mines in said Counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said City of Cleveland and to said village of Huron, both in the State of Ohio, was an intra-state movement, and therefore, within the jurisdiction of the Railroad Commission of Ohio.

5. The Court erred in ordering, adjudging and decreeing that said order of the Railroad Commission of Ohio made and entered on the 28th day of February, 1910, is void and of no effect.

6. Said court erred in enjoining and prohibiting the defendant Railroad Commission of Ohio from instituting, authorizing and directing any suit, action or actions for the purpose of putting its said order of February 28th, 1910, into effect or from enforcing the provisions of said order.

7. That said court erred in granting the prayer of the complainant in said suit and entering a final decree therein against this defendant.

Wherefore, said defendant prays that the finding, order judgment and decree of said court against it may be reversed, and that said court may be directed and ordered to enter a decree dismissing the complaint of complainant herein.

U. G. DENMAN,

Attorney-General of the State of Ohio,

Attorney for Defendant.

FREEMAN T. EAGLESON,

THOMAS H. HOGSETT,

Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, Receiver, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. Assignment of Errors. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. M. B. & H. H. Johnson, Cleveland, Ohio.

(Precipe.)

122 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, Defendant.

Precipe.

To the Clerk of Said Court:

Please prepare a transcript of the record in the above entitled cause for the United States Circuit Court of Appeals for the Sixth Circuit, and include therein all the pleadings and papers filed, testimony taken and orders entered in said case.

U. G. DENMAN,

Attorney-General of the State of Ohio,

Attorney for Defendant.

THOS. H. HOGSETT,

FREEMAN T. EAGLESON,

Of Counsel.

(Endorsement:) No. 7961. B. A. Worthington, Receiver, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. In Equity. Precipe. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. M. B. & H. H. Johnson, Cleveland, Ohio.

(Bond.)

In the Circuit Court of the United States for the Northern District
of Ohio, Eastern Division.

No. 7961. In Equity.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, Defendant.

Appeal Bond.

Know All Men by These Presents, That we, the Railroad Commission of Ohio, as principal, and American Bonding Company, of Baltimore as surety, are held and firmly bound unto B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company his certain attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly
123 and severally by these presents. Sealed with our seals and dated this 25th day of June, in the year of our Lord One thousand Nine hundred and Ten.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio in a suit pending in said court between B. A. Worthington, Receiver of The Wheeling and Lake Erie Railroad Company, complainant, and the Railroad Commission of Ohio, defendant, a decree was rendered against the said Railroad Commission of Ohio, and the said Railroad Commission of Ohio having been allowed an appeal in open court and filed a copy thereof in the office of the clerk of said court to reverse the decree in the aforesaid suit,

Now, the condition of the above obligation is such that if the said Railroad Commission of Ohio shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

AMERICAN BONDING COMPANY OF
BALTIMORE, *Surety.*

[SEAL.]

By C. K. LAWRENCE, *Attorney in Fact.*

Sealed and delivered in the presence of

Approved by

R. W. TAYLER, *Judge.*

(Endorsement:) No. 7961. B. A. Worthington, etc., Plaintiff vs. Railroad Commission of Ohio, Defendant. In the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division. In Equity. Appeal Bond. Filed June 25, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. M. B. & H. H. Johnson, Cleveland, Ohio.

(Certificate of Clerk.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

No. 7961. Chancery.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Complainant,

vs.

RAILROAD COMMISSION OF OHIO, Defendant.

124 NORTHERN DISTRICT OF OHIO, ss:

I, B. C. Miller, Clerk of the Circuit Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the record, including the petition for allowance of appeal, assignment of errors and the proceedings in said cause, as specified in the precipe for transcript filed by attorneys for appellant, Railroad Commission of Ohio, and there is embraced in such record, a true copy of the opinion of the Court therein filed and also the testimony, together with exhibits therein referred to, taken, used and filed, the originals of all which, remain in my custody as Clerk of said Court.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, Ohio, this 20 day of July, A. D. 1910, and in the 135th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk.*

By R. C. DEAN,

Deputy Clerk.

125 And afterward to wit on August 2, 1910, precipe for appearance of counsel was filed which is in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
Railroad Company.

Frank O. Loveland, Clerk of Said Court:

Please enter my appearance as counsel for the plaintiff.

U. G. DENMAN,

Attorney General of Ohio.

THOMAS H. HOGSETT,

FREEMAN T. EAGLESON,

Of Counsel for Plaintiff.

And afterwards to wit on April 6th, 1911, an entry was made upon
the Journal of said Court clothed in the words and figures as follows:

United States Circuit Court of Appeals Sixth Circuit.

126

No. 2090.

RAILROAD COMMISSION OF OHIO

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
Railroad Company.

Before Severens and Knappen, C. J., J., and McCall, D. J.

This cause is argued in part by Mr. William D. Turner for the
appellant and is continued until tomorrow for further argument.

And afterwards on April 7th, 1911, an entry was made upon the
Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R.
Co.

This cause is further argued by Mr. William D. Turner and Mr.
T. H. Hogsett for the appellant and by Mr. William B. Sanders and
Mr. William M. Duncan for the appellee and is submitted to the
Court.

127 And afterwards towit on May 2nd, 1911, a decree was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

128 And afterwards towit on May 16th, 1911, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

129 Filed May 16, 1911. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2090.

RAILROAD COMMISSION OF OHIO, Appellant.

v.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie Railroad Company, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Submitted April 7, 1911. Decided May 2, 1911.

Before Severens and Knappen, Circuit Judges, and McCall, District Judge.

SEVERENS, *Circuit Judge*, delivered the opinion of the court:

At the time when this bill was filed in the Circuit Court, there was pending therein a consolidated suit constituted by the consolidation

of a suit brought by the National Car Wheel Co., of New York against the Wheeling and Lake Erie R. R. Co., a corporation of Ohio, and another suit brought by the Central Trust Company of New York, a corporation of New York, against the same defendant. The object of the bill in the latter case was the foreclosure of a mortgage of the properties of the Railroad Company wherein the Trust Company was mortgagee. From the allegations in the bill now before us, we gather that the object of the bill of the Car Wheel Company was the winding up of the affairs of the Railroad Company on the ground of its insolvency, the marshaling of liens upon its property and the protection of all parties interested. From the nature of these suits, no other ground being suggested, it is inferable that the jurisdiction of the court depended in both cases upon the diverse citizenship of the parties.

Pursuant to the prayer of the bill in each of these two consolidated cases, B. A. Worthington was appointed receiver of "all and singular the property, assets, rights and franchises of the The Wheeling & Lake Erie Railroad Company, including all railroads and other property and assets, rights and franchises of whatsoever kind and description and wheresoever situated, owned or operated by the said railroad company, authorizing and directing the said receivership to keep the railroads and other property of said The Wheeling & Erie Railroad Company employed and used as the same were theretofore used, and to continue the operation of said railroads, and to institute and prosecute all such suits as might be necessary in the judgment of the receiver for the proper protection of the property and trusts thereby vested in him and of the business placed in his charge." And it is alleged that the receiver thereupon "took possession of the said property, assets and franchises of The Wheeling & Lake Erie Railroad Company, and ever since has been and is now in possession of and operating the said railroads and property under and pursuant to the orders of said court."

Under the authority of the foregoing order, the receiver filed this bill against the Railroad Commission of Ohio, alleging that prior to a certain recent date the Railroad Company had fixed, and for a long time had maintained, a rate called a lake cargo rate, of 90 cents per ton for the transportation of coal from a locality known as "No. 8 Mining District in Ohio" to Huron and Cleveland, ports in that State on Lake Erie, and unloading the coal from its cars into the holds of vessels and to distribute and "trim" the coal in the holds and prepare in all things the cargo for its further transportation to distant ports on the Upper Lakes. Other coal transported to Huron or Cleveland not intended for lake transportation, but intended to be thence distributed to nearby points was charged with a rate of 81 per ton for the original transportation to Huron or Cleveland, as the case might

be. But on the complaint of shippers from the mining district, that the rate of 90 cents per ton for the transportation of the lake cargo coal to Huron and Cleveland was unreasonably high and ought to be reduced as much as 20 cents per ton, the Railroad Commission of Ohio on due notice to the Railroad Company and a hearing of all parties, held the complaint well founded and on the

28th of February, 1910, ordered the rate to be reduced from 90 to 70 cents and directed its order to be put in force by the Railroad Company from and after the 22nd day of April following. The following paragraphs of the order show its substance and effect:

"It is therefore ordered that said defendants, the Wheeling & Lake Erie Railroad Company and B. A. Worthington as receiver thereof, be and each of them is hereby notified and required to cease and desist from charging, demanding, collecting and receiving said excessive and unreasonable rate of 90 cents per ton f. o. b. vessel for the transportation of coal, carloads, from mines on the lines of said the Wheeling & Lake Erie Railroad Company in what is known as the Number Eight District in Ohio to the village of Huron, Ohio, and to the city of Cleveland, Ohio.

"It is further ordered that a rate of 70 cents per ton f. o. b. vessel, which the commission have found to be a just and reasonable rate to be charged for the transportation of coal, carloads, from said Number Eight District to the village of Huron, Ohio, and the city of Cleveland, Ohio, be substituted for said rate of 90 cents per ton f. o. b. vessel, found by the commission to be unreasonable, which rate of 70 cents per ton f. o. b. vessel, as aforesaid, shall be charged, imposed, observed and followed in the future by said the Wheeling & Lake Erie Railroad Company and said B. A. Worthington, receiver of said company, and by each of them in lieu of and in substitution of said rate of 90 cents per ton f. o. b. vessel, found by the commission to be unreasonable."

The purpose of the receiver's bill is to restrain the enforcement of this order of the Commission and from instituting any suit or proceeding to compel obedience to it. To this end the receiver, after stating in his bill the conditions above stated, alleged a variety of facts and circumstances including the cost of transportation as compared with the rate enjoined by the Commission, as exhibited by the company's books and records which are set forth in detail, all tending to show, as the receiver claims, that the order of the Commission is confiscatory, and when compared with other rates charged and enforced by other railroad companies for similar services in nearby localities, discriminatory. Upon these allegations of fact of which the substance has been stated, the receiver charged as matter of law that the order of the Commission was void for the following reasons:

First. Because it "directly affects and interferes with this interstate commerce engaged in by your orator, over which the said Railroad Commission of Ohio has no authority or power inasmuch as the regulation of such commerce is vested in the Federal government under the provisions of the Constitution of the United States."

Second. Because it "deprives the owners and persons interested in the property constituting the receivership estate of their property without due process of law, denies to them the equal protection of the law, and takes private property for public purposes without due compensation."

Third. Because "the findings of the said Commission are contrary to the facts and are not supported by the testimony offered by

the parties at the time of the hearing before said Commission, and the said Commission, in its said findings of fact and conclusions of law, has failed to give due and proper consideration to the traffic conditions existing upon your orator's line of railroad. The said Commission has denied to your orator the right to recognize the effect of competition on rates, and has failed to distinguish between through and local rates. All as will appear from the testimony taken before said Commission which is tendered to the court for inspection upon the filing of this bill of complaint."

In addition to the Railroad Commission of Ohio, several other persons were made defendants such as mining companies and their representatives and shippers of coal from the locality above mentioned, whom it is unnecessary to further regard because as to all such other defendants the bill was dismissed, leaving the Railroad Commission as the sole defendant; and in that form the suit proceeded. The

133 Railroad Company thereupon answered the bill. It is only necessary to the determination of the questions we propose to consider, to say that the Commission admits the making of the order in question, as stated in the bill.

The whole controversy turns upon the question whether the Railroad Commission had authority to make the order. If it had not, all questions which relate to its merits become immaterial.

At the hearing in the Circuit Court, on the pleadings and proofs, Judge Taylor presiding, it was (as appears from his opinion sent up with the record) found, upon a recital of the facts as gathered from the evidence that the rate of 70 cents per ton was intended to apply to lake cargo coal destined for transportation to the Upper Lake ports, that is, to ports in other states and to such transportation only. We are satisfied, upon an examination of the evidence upon that point, that the conclusion of the learned judge was correct. It was thereupon decreed that the order fixing such rate was not within the power of the Railroad Commission of Ohio and was therefore void. And an injunction was ordered to issue restraining the Commission from attempting to enforce it. The case has been brought here by an appeal taken by the defendant, the Railroad Commission of Ohio.

The first matter to be attended to is that of a motion made by the appellee to dismiss the appeal "on the ground that the court has no jurisdiction to entertain it because the question involved is whether or not the order of the Railroad Commission of Ohio complained of is in contravention of the Constitution of the United States." We think the motion should be denied. It is based upon the erroneous conception that the appellate jurisdiction of the case is the same as that applicable to cases of original bills. But this is the case of a bill which is ancillary to the original suit; and the jurisdiction of the Circuit Court to entertain it depended upon its jurisdiction in those suits. They were brought by the receiver for the protection of the interests of the Railroad Company whose properties were in the hands of the court for administration. In such a case the court

134 does not look either to the citizenship of the parties to the ancillary suit nor to any other peculiar matter affecting its jurisdiction. It may be a case altogether devoid of those

conditions which are necessary to the jurisdiction of an original bill. *Pope v. Louisville & N. R. R. Co.*, 173 U. S. 573. *St. Louis K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247. *Loveland* on the Appellate Jurisdiction of the Federal Courts, Section 158. It may be proper, though it is unnecessary, to say that even if this were an original bill, the claims made by it are not all of a character which require the appeal to be taken to the Supreme Court under the provisions of Sect. 5 of the Act creating the Court of Appeals. Some of the claims made are of that character, but one of them, the 3rd, at least, is not; and if it stood alone the appeal must have been taken to the Circuit Court of Appeals. In such case the appellant has his election to take the case to either court, where all the questions involved will be considered.

Coming then to the merits, we observe that while such an order as that made by the Railroad Commission might have been a valid exercise of its power before the time when the Federal Government undertook the exercise of its own authority granted by the commerce clause of the Constitution, as it has done in recent years, yet in view of the legislation by Congress concerning the duties and liabilities of railroad companies engaged in inter-state commerce, the power of the states has been greatly circumscribed. To the extent that Congress has by valid legislation taken control of the subject of inter-state commerce and regulated it, the control over it by the states must give way to the exercise of the paramount authority. *Louisville & Nashville Rd. Co. v. Eubank*, 184 U. S. 27. The regulation by one governmental authority would be inconsistent with its regulation by another.

We think it unimportant to inquire whether the Interstate Commerce Commission has hitherto prescribed any rates for the particular service which is the subject of this suit. It is enough that the matter is within its control and for aught we know that Commission may have not deemed it necessary to take action upon the subject, being satisfied with existing conditions.

Upon the question whether the commerce to which this
135 rate of 70 cents is prescribed by the Railroad Commission of Ohio is applied, is inter-state, a number of decisions are cited by counsel for the respective parties and undoubtedly they are not all of them in accord. It is not necessary to analyze them or to point out the drift of each of them severally. We think there is little or no support to the contention which the counsel for the appellant here make against the finding and decree of the court below.

In the decision by this court in the case of *United States v. Geddes*, 131 Fed. 452, we carried the limit of the state's jurisdiction as far as has been done in any other decision. It was rested upon the peculiar circumstances of that case and particularly upon the facts that the railroad company's contract for transportation had been completely performed when it deposited the goods at its own station and it had nothing to do and was in no wise concerned with their future disposition, whether they should be taken away by the consignee or some other railroad company by his authority. These

special facts upon which the decision turned do not exist here. By the very terms of the service which the Wheeling & Lake Erie Railroad Company contracted to perform, it was required to deliver the coal into vessels provided to receive it and to load the vessels with the coal properly distributed in their holds and the cargo trimmed for its further transportation to the ports of other states. And this was included in the service for which the Commission fixed the rate of 70 cents per ton. It was a service which if the transportation had been ended by a delivery on its own docks or into its own warehouse would have been required to be performed by the subsequent carrier. Thus it participated in making the connection for the continuous transportation of the coal from the mines to its ultimate destination at the Upper Lake ports.

We are constrained to agree with the court below in its conclusion that the order of the Commission was beyond its powers. The law of Ohio defining its authority confined its functions to intrastate transactions, and gave it no authority to interfere with inter-state commerce. The fault is not in the law, but in
 136 the Commission's failure to observe the limitation imposed by it. It follows that its order was not one sanctioned by the laws of the State and derived no force or validity from its assumption of a power not delegated to it by the legislature. It is only when such quasi legislative bodies are acting within the scope of their authority that their orders have the quality of legislation, or may properly be said to be the laws of the State, as they are sometimes characterized. *Memphis v. Cumberland Telephone Co.*, 218 U. S. 624. *Louisville v. Cumberland Telephone Co.*, 155 Fed. 725, a case decided by this court. There is not here, therefore, a controversy as to whether a State law is in conflict with the Constitution or any law of the United States.

The decree of the Circuit Court must be affirmed.

And afterwards to wit on June 22nd 1911 a petition for
 137 appeal to the Supreme Court of the United States was filed which reads and is as follows:

United States Circuit Court of Appeals Sixth Circuit.

2090.

RAILROAD COMMISSION OF OHIO

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R. Co.

Petition for Appeal.

The above named appellant, the Railroad Commission of Ohio, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on the 2nd day of

May, A. D. 1911, affirming the decree of the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division, and that the matter in controversy in said suit exceeds Five Thousand Dollars (\$5,000.00), exclusive of costs; that said cause is one in which the United States Circuit Court of Appeals for the

138 Sixth Circuit has not final jurisdiction; that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the Circuit Court of Appeals for the Sixth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Clerk of the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant, may be reviewed and if error be found, corrected according to laws and customs of the United States.

TIMOTHY S. HOGAN,

Attorney General of Ohio, Solicitor for Appellant.

T. H. HOGSETT,

CHAS. E. MARSHALL,

FRANK DAVIS, JR.,

Of Counsel.

And on the same day, to-wit on June 22nd 1911, an assignment of errors was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

139

#2090

RAILROAD COMMISSION OF OHIO

vs.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie R. R.
Co.

Assignment of Errors.

The appellant in the above entitled cause in connection with its petition for appeal herein, presents and files therewith this assignment of errors as to which matters and things it says that the decree entered herein on the 2nd day of May, A. D. 1911, is erroneous, to-wit:

First. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of said Circuit Court for the Northern District of Ohio, Eastern Division that the commerce to which said lake cargo rate is applicable is interstate commerce.

Second. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the findings of said Circuit Court for the Northern District of Ohio, Eastern Division that said lake cargo
140 rate applies only to coal transported from a point in the State of Ohio, to-wit, the Number Eight District, to a point outside the State of Ohio.

Third. That said Circuit Court of Appeals for the Sixth Circuit erred in not finding and holding upon a consideration of all the evidence that the movement or transportation of said Number Eight lake coal from said mines in said counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said city of Cleveland and said Village of Huron, both in the State of Ohio, was an intra-state movement or transportation.

Fourth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged for the services rendered in the transportation of said lake cargo coal.

Fifth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that said order of the Railroad Commission of Ohio, establishing rates for the movement or transportation of said lake cargo coal, is void and of no effect.

141 Sixth. That said Circuit Court of Appeals for the Sixth Circuit erred in not holding and deciding that said Railroad Commission of Ohio had power to prescribe the rate to be charged for services rendered in the transportation of said lake cargo coal and in not holding and deciding that said order of said Railroad Commission of Ohio is legal and binding on appellee herein.

Seventh. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Eighth. That said Circuit Court of Appeals for the Sixth Circuit erred in not reversing the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Ninth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division, which said decree declared that said order of appellant entered on the 28th day of February, 1910, was void and of no effect.

142 Tenth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the order of said Circuit Court for the Northern District of Ohio, Eastern Division, enjoining appellant from instituting, authorizing and directing any suit, action or actions for the purpose of putting said order of said appellant, made February 28, 1910, into effect.

Wherefore, appellant prays the Honorable Court to examine and correct the errors herein assigned and for the reversal of the finding, order, judgment and decree of the Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case.

TIMOTHY S. HOGAN,

Attorney General of the State of Ohio,

Solicitor for Appellant.

T. H. HOGSETT,
CHAS. C. MARSHALL,
FRANK DAVIS, JR.,
Of Counsel,

And afterwards to wit on June 24th 1911, an order allowing said appeal was entered in said cause which reads and is as follows:

143 United States Circuit Court of Appeals, Sixth Circuit.

#2090.

RAILROAD COMMISSION OF OHIO

VS.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
R. R. Co.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed, upon the approval of a bond on appeal in the sum of \$500.00, such appeal not to operate as a supersedeas.

LOYAL E. KNAPPEN,

United States Circuit Judge, Sixth Circuit.

Dated June 23, 1911.

And afterwards to wit on July 18th 1911 a bond on appeal to the Supreme Court was filed which reads and is as follows:

144 United States Circuit Court of Appeals, Sixth Circuit.

#2090.

RAILROAD COMMISSION OF OHIO

VS.

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
R. R. Co.

Bond on Appeal.

Know all men by these presents That we, Railroad Commission of Ohio, as Principal, and The National Surety Company of New York, as Surety, are held and firmly bound unto B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, in the full and just sum of \$500.00, to be paid to the said B. A. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company, his certain successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 14th day of July, A. D. 1911.

Whereas, the Railroad Commission of Ohio, the appellant
 145 in the above entitled suit, has prosecuted an appeal to the
 Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Sixth Circuit, on the 2nd day of May, A. D. 1911.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

RAILROAD COMMISSION OF OHIO,
 By C. A. RADCUPP, *Secretary*,
 NATIONAL SURETY COMPANY OF
 NEW YORK,
 R. W. SCHNEIDER,

[SEAL.]

Resident Vice President,
 — CARROLL, *Resident Ass't Sect.*

The foregoing bond is approved this 17th day of July A. D. 1911, said appeal not to operate as a supersedeas.

LOYAL E. KNAPPEN,
United States Circuit Judge, Sixth Circuit.

146 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Railroad Commission of Ohio vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company No. 2090, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 31st day of July A. D. 1911.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of
 Appeals for the Sixth Circuit.*

120 RAILROAD COMMISSION OF OHIO VS. B. A. WORTHINGTON, ETC.

147 RAILROAD COMMISSION OF OHIO

against

B. A. WORTHINGTON, Receiver of The Wheeling & Lake Erie
Railroad Company.

Citation.

148 United States Circuit Court of Appeals, Sixth Circuit.

UNITED STATES OF AMERICA,

Sixth Circuit:

To B. A. Worthington, Receiver of The Wheeling & Lake Erie
Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals, for the Sixth Circuit, wherein the Railroad Commission of Ohio is appellant, and you are appellee, to show cause, if any there be, why the decree rendered the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

This citation is issued on account of an error in, and in lieu of, a former citation issued pursuant to said appeal and dated July 17th, A. D. 1911.

Witness the Honorable Loyal E. Knappen, Judge of the United States Circuit Court of Appeals, for the Sixth Circuit, this 26th day of July, A. D. 1911.

LOYAL E. KNAPPEN,

*Judge of the United States Circuit Court
of Appeals, Sixth Circuit.*

Service of the above citation and receipt of a copy thereof are hereby acknowledged and appearance of appellee herein is hereby entered this 8th day of August, A. D. 1911.

SQUIRE, SANDERS & DEY,

Attorneys for Appellee.

149 [Endorsed:] No. 2090. Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Appellee. United States Circuit Court of Appeals for the Sixth Circuit. Citation.

Endorsed on cover: File No. 22,852. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 776. Railroad Commission of Ohio, appellant, vs. B. A. Worthington, receiver of The Wheeling & Lake Erie Railroad Company. Filed September 7, 1911. File No. 22,852.

Office Supreme Court U. S.
FILED

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

**RAILROAD COMMISSION OF OHIO,
APPELLANT,**

vs.

**B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,
APPELLEE.**

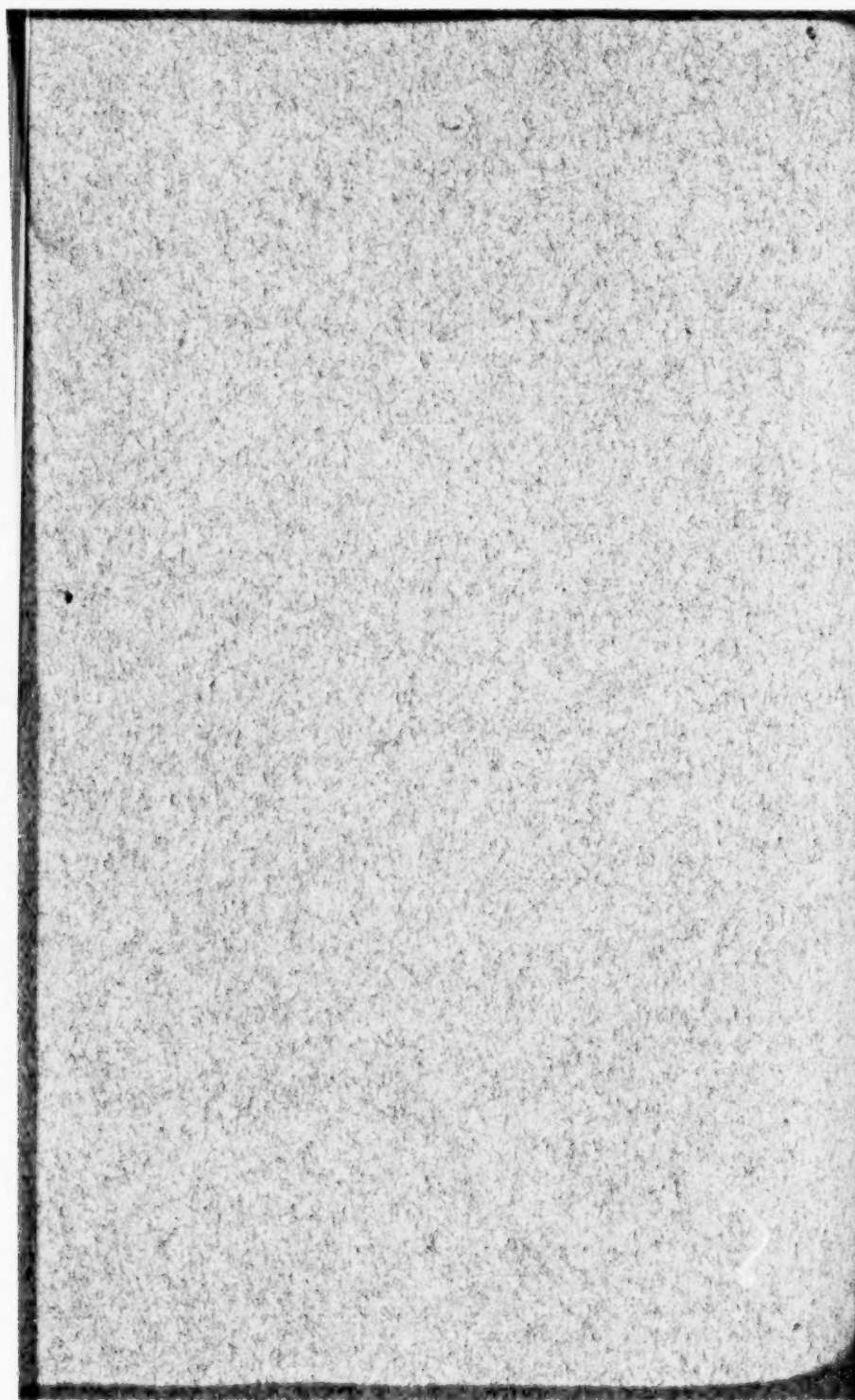
**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.**

**NOTICE, MOTION AND GROUNDS OF APPELLANT
TO CONSOLIDATE AND ADVANCE
FOR HEARING.**

**TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,**

**FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,**

. Attorneys for Appellant.



Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

**NOTICE, MOTION AND GROUNDS OF APPELLANT
TO CONSOLIDATE AND ADVANCE
FOR HEARING.**

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

Notice, Motion and Grounds of Appellant to Consolidate and Advance for Hearing.

Notice.

*To Messrs. Squire, Sanders & Dempsey, Counsel for
Appellee herein, and in Case No. 505, described
below:*

Please take notice that the undersigned, as counsel for the appellant, will make a motion before the Court at the opening of its session on Monday, the 6th day of November, 1911, at or about the hour of noon, or as soon thereafter as counsel can be heard, to consolidate with the above styled case, the case of "Railroad Commission of Ohio, Appellant, against B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company,

Appellee," being case No. 505 on the docket of this Court for the October Term, 1911, to dispense with the printing of the record in said case No. 505, and to advance said consolidated case for hearing at the present term, or as soon thereafter as the other business of the Court will permit. Also please take notice that in support of said motion to consolidate and advance, the undersigned counsel will file and present to the Court, upon the submission of said motion, the grounds therefor, a copy of which motion and grounds is herewith served upon you.

TIMOTHY S. HOGAN,
FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,

Counsel for Appellant.

Service of the above notice is hereby accepted and receipt of a copy thereof, together with the motion and grounds to consolidate and advance for hearing is hereby acknowledged, this 13th day of October, 1911.

SQUIRE, SANDERS & DEMPSEY,
WM. B. SANDERS,
W. M. DUNCAN,

Counsel for Appellee herein
and in case No. 505 referred
to in said notice and motion.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

*vs.***B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,**APPELLEE.

**Motion and Grounds to Consolidate and Advance
for Hearing.**

Now comes the appellant herein and moves the Court to consolidate with the above styled case, case No. 505 on the docket of this Court for the October Term, 1911, entitled "Railroad Commission of Ohio, appellant, against B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, appellee," to dispense with the printing of the record in said last named case, No. 505, and to advance said consolidate case for hearing at the present term, or as soon thereafter as the other business of the Court will permit, on the following grounds, to-wit:

(1) The parties to both of the cases whose consolidation is herein sought are represented in this Court by the same attorneys, and the suit in which both these cases originated was a suit in equity and was instituted on the 28th day of March, 1910, in the Circuit Court of

the United States for the Northern District of Ohio, Eastern Division, by appellee herein, against appellant herein, the Railroad Commission of Ohio, to enjoin the enforcement of a certain order which said Railroad Commission of Ohio had theretofore made and entered in a proceeding before the said Commission, wherein The Pittsburgh Vein Operators' Association of Ohio was complainant and The Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of said Company, were defendants, which said order of said Railroad Commission established a rate of Seventy Cents (70c) per ton as the reasonable rate which should and must thereafter be charged by The Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of said Company, for the transportation of coal in car load lots from the Number Eight coal district in the State of Ohio to the ports of Huron and Cleveland, also in the State of Ohio, for transshipment by lake vessels.

Appellee herein in the complaint filed in said Circuit Court sought to enjoin the enforcement of said order on various grounds, but the only one finally insisted upon and the only one considered by said Circuit Court was that said order constituted an undue interference with Interstate Commerce in contravention of Section 8, Article 1 of the Constitution of the United States.

After hearing said cause said Circuit Court granted the prayer of the complaint and entered its decree, wherein it found that the trade or commerce in said coal traffic engaged in by complainant constituted Interstate Commerce, adjudged said order of said Railroad Commission of Ohio to be null and void and enjoined said

Railroad Commission of Ohio from enforcing said order.

(2) Subsequent to the making and entering of said decree by said Circuit Court, appellant herein perfected an appeal from said Circuit Court to the United States Circuit Court of Appeals for the Sixth Circuit, said appeal being cause No. 2090 on the docket of said Circuit Court of Appeals.

After said case had been appealed to the Circuit Court of Appeals for the Sixth Circuit and because of the existence of doubt as to whether said case was of such a nature that it could be properly appealed to the Circuit Court of Appeals, appellant also perfected an appeal from said Circuit Court direct to this Court, which said direct appeal is case No. 505 on the docket for the October Term, 1911, of this Court above referred to.

(3) After the perfecting of the direct appeal from the said Circuit Court to this Court, said cause as appealed to the Circuit Court of Appeals for the Sixth Circuit came on for hearing, and said Circuit Court of Appeals affirmed the decision of said Circuit Court, whereupon an appeal was perfected to this Court from said Circuit Court of Appeals, said cause on appeal from said Circuit Court of Appeals being case No. 776 on the docket for the October Term, 1911, of this Court, in which case this motion is filed.

(4) Since the record filed with this Court on direct appeal in case No. 505 is identical, except as to the appellate procedure, with the record taken to said Circuit

Court of Appeals in the present case, which has since been appealed to this Court, it follows that the two causes, whose consolidation is herein sought, present precisely the same issues to this Court, the only reason for said issues being presented to this Court in two causes being the inability to determine because of the uncertain meaning and dual nature of certain jurisdictional averments, which method of appeal was the proper one.

Permitting the consolidation of said causes now pending in this Court and dispensing with the printing of the record in case No. 505 will, therefore, conduce to the convenience of this Court and will avoid labor and expense which would otherwise be entailed upon both of the parties to these suits.

(5) The only issue raised in these two cases is whether or not the Railroad Commission of Ohio had and has authority to fix and establish the rate which shall be charged for transporting said lake cargo coal over the Wheeling & Lake Erie Railroad under a contract of carriage providing for the transportation of said coal from said mines in the State of Ohio, and the delivery of the same on board vessel at Ports of Huron and Cleveland, both in the State of Ohio, for carriage by vessel beyond, all of said transportation and delivery by said railroad taking place exclusively within the confines of the State of Ohio, and there being no common arrangement between the rail and water carrier for through transportation to any point beyond the State of Ohio, said coal when delivered aboard said lake vessels in

some instances continuing to be the property of the operator or shipper and in other instances then becoming the property of the purchaser of said coal from said operator or shipper.

(6) The movement of said lake cargo coal for the season of 1912 will begin in the months of March or April of that year and contracts for the sale of some of said lake cargo coal to be shipped during the year of 1912 will in all probability be made soon after the first of January, 1912, so that it is highly desirable on the part of the coal operators, the Railroad Company, and the public that it be ultimately determined as speedily as possible in what authority is vested the power to establish the rates on the commerce under consideration.

(7) Over one-half million tons of said lake cargo coal are transported annually over the line of railroad of which appellee herein is Receiver, and approximately Three Million tons of coal are transported on other lines of railroad from said Number Eight coal district in the State of Ohio to the lower lake ports in said state, for transportation by lake vessel beyond, so that the decision reached in the present case as to whether or not the Railroad Commission of Ohio is vested with authority to establish the rate in question will in effect also determine whether or not said Railroad Commission of Ohio has authority to regulate the rates which shall be charged on those other railroads and decide a question of wide public interest and concern.

Permitting the consolidation of the cases described herein and the hearing of the same at an early date will,

therefore, result in a single and speedy determination of a question of disputed State and Federal control and of vital interest and concern to the business and citizens of a large section of the United States.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Attorneys for Appellant.

Office Supreme Court U. S.

FILED

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JAMES H. MCKENNEY,

Clerk.

Supreme Court of the United States.

October Term, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

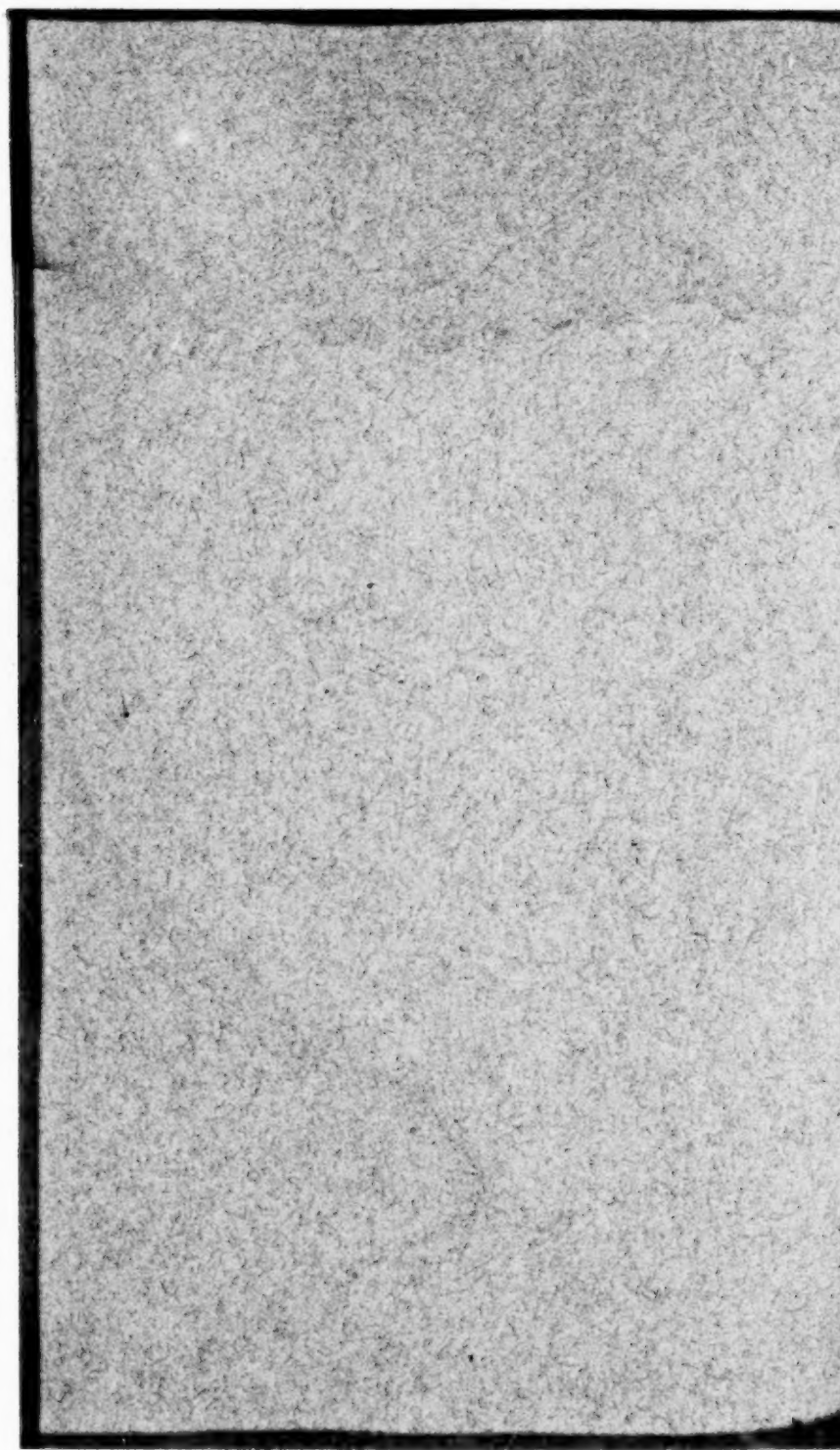
APPELLEE.

**Brief on Behalf of Appellee in Opposition to Motion of Appellant
to Consolidate and Advance for Hearing.**

WM. B. SANDERS,

W. M. DUNCAN,

Counsel for Appellee.



Supreme Court of the United States.

October Term, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

APPELLEE.

**Brief on Behalf of Appellee in Opposition to Motion of Appellant
to Consolidate and Advance for Hearing.**

WM. B. SANDERS,

W. M. DUNCAN,

Counsel for Appellee.



Supreme Court of the United States.

October Term, 1911.
No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company.
APPELLEE.

Brief on Behalf of Appellee in Opposition to Motion of Appellant to Consolidate and Advance for Hearing.

The appellant seeks to consolidate Cause No. 776 herein with Cause No. 505, for the October Term, 1911, entitled "Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Appellant," in substance upon the ground that the two cases involve the same controversy. The appellant also urges that the cases be advanced for hearing because the subject matter involves "a question of disputed state and federal control."

It is stated in paragraph 2, sub-division 1 of the motion, that the only ground "finally insisted upon" by the appellee herein, "and the only one considered by said Circuit Court was that the order constituted an undue interference with interstate commerce in contravention of Section 8, Article 1 of the Constitution of the

United States.' This statement is partially incorrect, as will appear from an examination of the record. The court, having reached the conclusion that the commerce to which the rate in controversy applied was interstate commerce, simply refused to consider the other grounds urged by the complainant. The complainant, as a matter of fact, did not waive the other grounds (Circuit Court of Appeals Record, page 118).

We submit that the motion should be denied, for the following reasons:

The appellant herein has filed in this cause a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals; and in the brief filed in support of said petition the appellant claims that appeal did not lie direct to this Court from the finding and decree of the Circuit Court, and admits that the decision of the Circuit Court of Appeals is final.

The record being in this state, it would appear that both appeals, namely, Causes No. 505 and No. 776, have been taken improperly and should be dismissed. The motion to consolidate and to advance should be denied.

Respectfully submitted,

WM. B. SANDERS,

W. M. DUNCAN,

Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM 1911

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

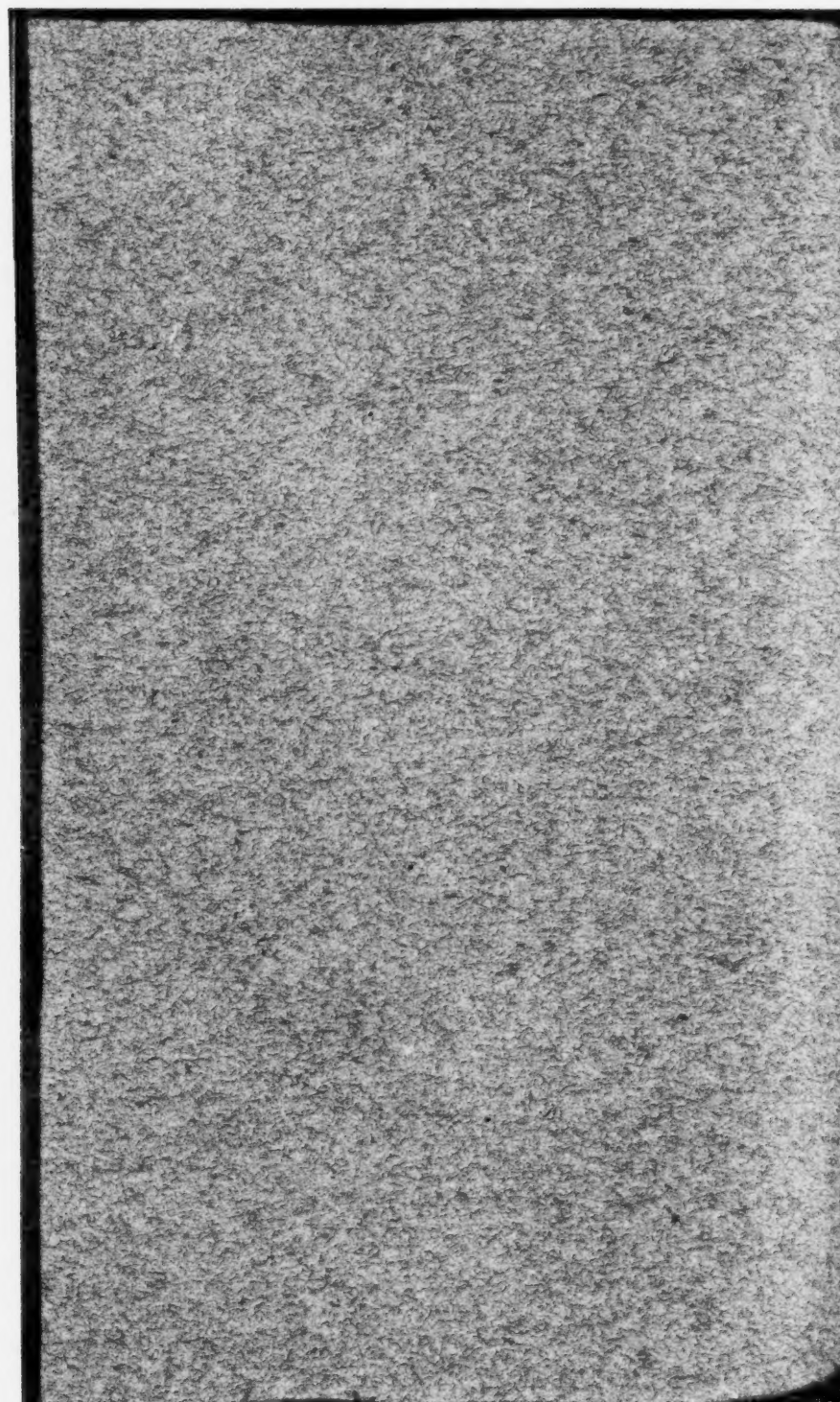
**B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,**

APPELEE.

**PETITION OF APPELLANT FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT.**

TIMOTHY S. HOBAN,
Attorney General of the State of Ohio,

**FRANK DAVIS JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,**
Of Counsel.



Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,
APPELLEE.

**PETITION OF APPELLANT FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT.**

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

APPELLEE.

Petition of Appellant for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Your petitioner, The Railroad Commission of Ohio, respectfully shows to this Honorable Court as follows:

That on the 28th day of March, A. D. 1910, appellee herein, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, filed his Bill of Complaint in the United States Circuit Court for the Northern District of Ohio, Eastern Division, against appellant herein, The Railroad Commission of Ohio, praying that said Railroad Commission of Ohio be enjoined and restrained from enforcing or putting into effect a certain order of said Railroad Commission of Ohio theretofore made, which said order of said Railroad Commission of Ohio established and fixed a rate of Seventy Cents (70c) per ton for transporting so-called lake cargo coal over the line of railroad operated by said B. A. Worthington,

Receiver of The Wheeling & Lake Erie Railroad Company, from the mines in the Number Eight District in the State of Ohio to the ports of Huron and Cleveland, both in the State of Ohio and there transferring the same from the railroad cars to the holds of lake vessels. Several different grounds were set out in the complaint as a basis for the relief prayed for, but the only ground upon which the suit proceeded to issue was that the order of the Railroad Commission interfered with Interstate Commerce.

That said cause came on for hearing before said court, and on the 25th day of June, 1910, said court entered its decree enjoining the enforcement of said order of the Railroad Commission of Ohio on the ground that the same was an undue interference with Interstate Commerce.

That said cause was then appealed to the Circuit Court of Appeals for the Sixth Circuit, and on the 2nd day of May, 1911, said Circuit Court of Appeals affirmed the decision of the Circuit Court.

In order that this Honorable Court may understand the grounds on which this petition for certiorari is based, the following additional statement is submitted:

The Bill of Complaint avers that complainant is the Receiver of The Wheeling & Lake Erie Railroad Company as the result of an appointment made by said United States Circuit Court for the Northern District of Ohio, Eastern Division, in certain causes then pending in said court, and that by order of said court he is authorized to file his Bill of Complaint against the Railroad Commission of Ohio. Said Bill of Complaint also

avers that said order of the Railroad Commission of Ohio constitutes an unlawful interference with the property constituting said receivership estate.

As a result of said averments and other related averments, said Circuit Court of Appeals concluded that said Bill of Complaint so filed by said Receiver in said Circuit Court was "ancillary to the original suit and the jurisdiction of the Circuit Court to entertain it depended upon its jurisdiction in those suits," that is, the original suits in connection with which the Receiver was appointed, as will be found in the printed report of the decision of that case by said Circuit Court of Appeals in 187 Federal Reporter, 965, 968.

Said Bill of Complaint also alleged that said Railroad Commission of Ohio,

"as respects the matters and things hereinafter set forth, and as to the orders and rulings of said Railroad Commission, has assumed and pretended to act under delegated power from the Legislature of the State of Ohio,"

and later on in the bill it is also alleged that the traffic affected by said order of the Railroad Commission of Ohio is Interstate Commerce, consisting of lake cargo coal, which is

*"actually transported from the mines in Ohio to docks at the head of the Great Lakes outside of the State of Ohio by a continuous carriage * * *."*

The law creating the Railroad Commission of Ohio and prescribing its powers and limitations provided and provides expressly as follows:

"The provisions of the act shall apply to the trans-

*portation of passengers and property between points within this state * * *."*

General Code 1910, Section 502.

In the opinion handed down by said United States Circuit Court of Appeals, it is stated that said order of the Railroad Commission of Ohio was beyond its powers, and that said Railroad Commission failed to observe the limitation imposed upon it by the law, and that said order was therefore "not one sanctioned by the laws of the state," the said opinion concluding with the statement that

"there is not here, therefore, a controversy as to whether a state law is in conflict with the Constitution or any law of the United States."

187 Fed. Rep., 965, 970.

That subsequent to the entering of said decree by said Circuit Court and subsequent to the appeal taken to said Circuit Court of Appeals, but prior to the hearing of said cause by said Circuit Court of Appeals, your petitioner also perfected an appeal in said cause from said Circuit Court direct to this Honorable Court lest it should ultimately be held that the Bill of Complaint claimed that the order of the Railroad Commission of Ohio amounted to a law of the State of Ohio, and that the jurisdictional averment that such law of the State of Ohio contravened the provisions of the 14th Amendment and the Commerce Clause of the Constitution of the United States, served to give said Circuit Court original as distinguished from ancillary jurisdiction of said cause, in the event of which ultimate holding it would result that the only proper method of appeal would be

direct to this Honorable Court. Said cause on direct appeal is now on the docket of this Court, being Number 505 for the October Term, 1911.

Subsequent to the said decision of said Circuit Court of Appeals affirming the decree of said Circuit Court, an appeal in this cause was also perfected from said Circuit Court of Appeals to this Honorable Court on the theory that, if it should ultimately be held that said complaint claimed that said order of the Railroad Commission of Ohio constituted a law of the state in contravention of the Constitution of the United States, and thereby raised a constitutional question in an ancillary bill, your petitioner would have the right to appeal said cause from said Circuit Court of Appeals to this Court. Said cause on appeal to this Court from said Circuit Court of Appeals is now on the docket of this Court, being Number 776 on the docket of the October Term, 1911, in which cause this petition is filed.

Upon this statement of facts and the certified copy of the record in this case, which is filed herein in connection with the appeal in said cause perfected from said Circuit Court of Appeals and which is exhibited herewith as a part of this application, your petitioner submits the following reasons why the judgment of the Circuit Court of Appeals affirming the decree of the Circuit Court should be brought here for review by this Court on Writ of Certiorari:

First. Because your petitioner has no right of appeal or writ of error herein, if, in accordance with the contention hereby made herein in support of this petition, it shall ultimately be determined either that the

jurisdiction of the United States Circuit Court for the Northern District of Ohio in said cause was purely ancillary and in no wise extended by any additional jurisdictional averments, or that it was not even claimed in the Bill of Complaint filed in said cause that said order of the Railroad Commission of Ohio constituted a law of the State of Ohio in contravention of the Constitution of the United States.

Second. Because the allowance of the Writ of Certiorari herein prayed for, in addition to the two appeals perfected in said cause, as hereinbefore referred to, will avoid the necessity of an extensive examination and investigation on the part of this Court for the purpose of deciding positively whether or not this Court has jurisdiction on appeal.

Third. Because of the great importance of the case to the public and the parties.

Fourth. Because said Circuit Court of Appeals erred in affirming the findings of said Circuit Court that the commerce to which said rate on lake cargo coal is applicable is interstate commerce.

Fifth. Said Circuit Court of Appeals erred in affirming the findings of said Circuit Court that said rate on lake cargo coal applies only to coal transported from a point in the State of Ohio, to-wit, the Number Eight District, to a point outside the State of Ohio.

Sixth. Said Circuit Court of Appeals erred in not finding and holding upon consideration of all the evidence that the movement or transportation of said lake cargo coal from said Number Eight District coal mines

in the State of Ohio to said ports of Cleveland and Huron in the State of Ohio was an intrastate movement or transportation.

Seventh. Said Circuit Court of Appeals erred in holding and deciding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged for the services rendered in the transportation of said lake cargo coal.

Eighth. Said Circuit Court of Appeals erred in holding and deciding that said order of the Railroad Commission of Ohio, establishing rates for the movement or transportation of lake cargo coal is void and of no effect.

Ninth. Said Circuit Court of Appeals erred in not holding and deciding that said Railroad Commission of Ohio had and has power to prescribe the rate to be charged for services rendered in the transportation of said lake cargo coal, and in not holding and deciding that said order of said Railroad Commission of Ohio is legal and binding on appellee herein.

Tenth. Said Circuit Court of Appeals erred in affirming the decree of the said Circuit Court.

Eleventh. Said Circuit Court of Appeals erred in not reversing the decree of said Circuit Court.

Twelfth. Because the Circuit Court of Appeals has failed to follow or to give force or effect to the rulings and decisions of this Court on the legal propositions involved.

Thirteenth. Because a full consideration of this case by this Honorable Court will tend to prevent future

costly and undesirable litigation and promote justice among all interested.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this Court on a day certain therein to be designated a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals, entitled, "Railroad Commission of Ohio, appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, appellee, No. 2090," to the end that said cause may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled, "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

RAILROAD COMMISSION OF OHIO,

By TIMOTHY S. HOGAN,

Attorney General of the State of Ohio.

FRANK DAVIS, JR.,

CHAS. C. MARSHALL,

T. H. HOGSETT,

Of Counsel.

State of Ohio,
Cuyahoga County, ss.:

T. H. HOGSETT, being first duly sworn, deposes and says that he is one of the counsel for the Railroad Commission of Ohio, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

T. H. HOGSETT.

Sworn to before me by the said T. H. Hogsett and by him subscribed in my presence, this 5th day of October, A. D. 1911.

My commission expires June 1, 1914.

(Seal.)

W. D. TURNER,

Notary Public.



FILED

OCT 14 1911

JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

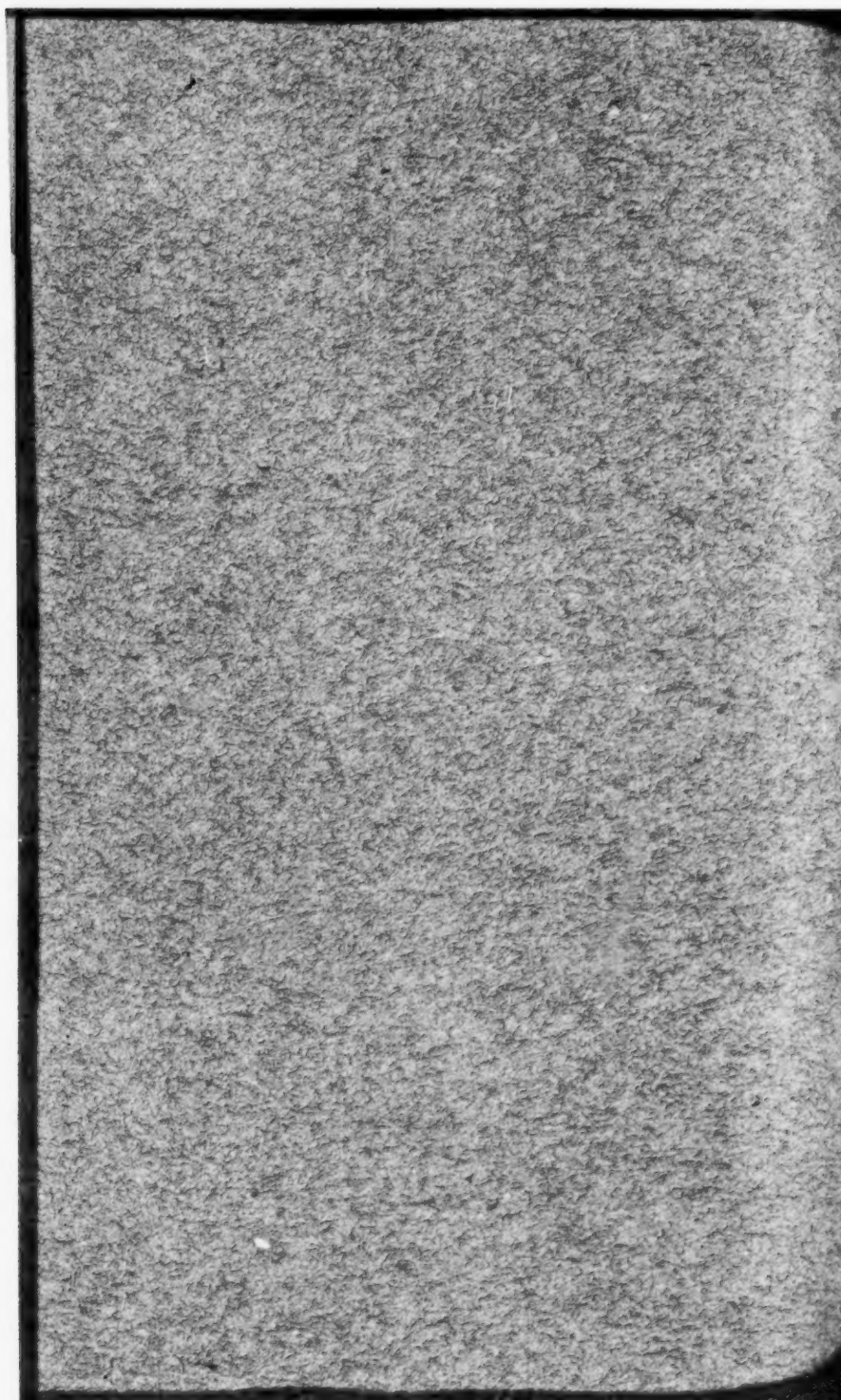
vs.

**B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,**
APPELLEE.

**BRIEF IN SUPPORT OF PETITION OF APPELLANT
FOR WRIT OF CERTIORARI.**

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
Attorney for Appellant.

**FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,**
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TIMOTHY S. HOGAN,
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FRANK DAVIS, JR.,
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Supreme Court of the United States.

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RAILROAD COMMISSION OF OHIO,
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vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
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APPELLEE.

BRIEF IN SUPPORT OF PETITION OF APPELLANT FOR WRIT OF CERTIORARI.

STATEMENT.

We desire to discuss somewhat more at length than was done in the petition for Certiorari herein the reasons for filing said petition and to suggest to this Court the grounds upon which it may deem it proper to grant the Writ.

As stated in the petition for Certiorari filed herein, the case whose record is sought to be brought here by that Writ directed to the Circuit Court of Appeals for the Sixth Circuit is also pending in this Court on appeal from said Circuit Court of Appeals, as well as on direct appeal to this Court from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division. Of course, if either of these appeals was properly taken there is no reason for allowing this peti-

tion for Certiorari. It is also obvious that only one of the appeals taken to this Court properly lies. However, because of the contrariety of opinion as to the exact basis upon which the jurisdiction of the Circuit Court was originally predicated in this suit, and because of the importance of the issues involved, it has been deemed advisable, by your petitioner herein to pursue every available avenue for the purpose of properly and certainly presenting the issues of the case to this Court.

Accordingly, we shall herein, in support of the petition for Writ of Certiorari, present to this Court reasons why it may be and should be held that the decision in this case in the Circuit Court of Appeals for the Sixth Circuit is final; that neither of the appeals to this Court was properly taken; that the only proper method of obtaining an adjudication of the issues by this Court is by seeking a Writ of Certiorari; and that the issues involved are such as to justify this Court in its discretionary allowance of the petition for the Writ of Certiorari.

BRIEF.

I.

DIRECT APPEAL FROM THE CIRCUIT COURT TO
THIS COURT DOES NOT LIE IN
THIS SUIT.

A. IT IS NOT "CLAIMED" IN THE BILL OF COMPLAINT IN THIS CASE THAT THE CONSTITUTION OR LAW OF A STATE IS "IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES," AND, THEREFORE, NO RIGHT OF DIRECT APPEAL TO THIS COURT EXISTS.

Act of March 3, 1891, Section 5 (U. S. Compiled Statutes, 1901, p. 549).

The Bill of Complaint alleges that

"the Railroad Commission of Ohio * * *, as respects the matters and things hereinafter set forth, and as to the orders and ruling of said Railroad Commission, *has assumed and pretended to act under delegated power from the Legislature of the State of Ohio.*"

The bill also avers that the traffic affected by the order of the Railroad Commission is Interstate Commerce which is

"actually transported from mines in Ohio to docks at the head of the Great Lakes outside of the State of Ohio by continuous carriage broken only by the necessary unloading from cars into vessels."

The law of the State of Ohio prescribing the powers and limitations of the Railroad Commission of that state as it existed at the time of the filing of the Bill and as it now exists and with the existence of which the court was charged by judicial notice, expressly states:

"The provisions of this act shall apply to the transportation of passengers and property between points within this State."

General Code, 1910, Section 502.

The Bill of Complaint, therefore, avers that the Railroad Commission of Ohio has assumed and pretended to do exactly that which the Statute of the State says it may not do, and the general allegations contained in the latter part of the Bill of Complaint to the effect that the Statutes of the State caused such an order of the Railroad Commission to become a law of the state, are, we submit incorrect, for the reason that the Statute, of course, only declares that orders of the Railroad Commission applying to transportation between points within the State of Ohio shall become and have the force of a law of the state.

The following language quoted from the final paragraph of the opinion of the Circuit Court of Appeals in the case below leads us to think that quite likely that court was of the opinion that it was not claimed in the Bill of Complaint that any law of the State was in contravention of the Constitution of the United States:

“We are constrained to agree with the court below in its conclusion that the order of the Commission was beyond its powers. The law of Ohio defining its authority confined its functions to intrastate transactions, and gave it no authority to interfere with interstate commerce. The fault is not in the law, but in the Commission’s failure to observe the limitation imposed by it. It follows that this order was not one sanctioned by the laws of the state, and derived no force or validity from this presumption of a power not delegated to it by the Legislature. It is only when such quasi legislative bodies are acting within the scope of their authority that their orders have the quality of legislation or may properly be said to be the laws of the State as they are sometimes characterized. *Memphis vs.*

Cumberland Telephone Co., 218 U. S., 624; *Louisville vs. Cumberland Telephone Co.*, 155 Fed., 725, a case decided by this court. *There is not here, therefore, a controversy as to whether a state law is in conflict with the Constitution or any law of the United States.*" (Italics ours.)

We, therefore, respectfully suggest that the Bill of Complaint avers that the Railroad Commission of Ohio acted *ultra vires*, and if such be the case it is well settled that such an averment does not amount to an allegation that a law of the State contravenes the Federal Constitution, and will not, therefore, furnish a sufficient basis for Federal jurisdiction or ground for a direct appeal to this Court.

Memphis vs. Cumberland Telephone Co., 218 U. S., 624.

Barney vs. City of New York, 193 U. S., 430.

Louisville vs. Cumberland, etc., Co., 155 Fed. Rep., 725 (Circuit Court, Sixth Circuit, 1907).

Manhattan Railway Co. vs. Mayor, etc., of the City of New York, 18 Fed. Rep., 195.

B. AN APPEAL WAS PROPERLY PERFECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT PRIOR TO THE TIME WHEN THE DIRECT APPEAL TO THIS COURT WAS MADE.

(1) The appeal to the Circuit Court of Appeals was properly made, since it is clear from the Bill of Complaint that at least one of the jurisdictional averments therein was the existence of the receivership under the control and authority of the court in which the Bill was filed and the necessity for the protection of the receivership estate in the hands of the receiver appointed by that court.

We do not deem it necessary to quote the language

of the averments of the Bill, which sets out at length the appointment of the complainant as the receiver of the property of the Railroad Company by that court in certain causes therein referred to by name and that by order of that court the receiver is authorized to file the present Bill; that the order of the Railroad Commission "constitutes an unlawful interference with the property constituting the receivership estate administered as aforesaid"; and that the complainant receiver was appointed such in a suit brought against The Wheeling & Lake Erie Railroad Company by The National Car Wheel Company of the State of New York. The Bill of Complaint contains many other averments with respect to the receivership estate and the baneful effect which the order of the Railroad Commission will have thereon, and the only intimation as to the basis of the Circuit Court's jurisdiction in the original suit in which the complainant was appointed receiver is the diversity of citizenship suggested by the location of The National Car Wheel Company, which instituted the receivership proceeding.

The Circuit Court of Appeals on the hearing of this case below, upon motion of the receiver to dismiss the appeal in that court, had no doubt but that the jurisdiction of the Circuit Court was ancillary, and that the original receivership suit being appealable to the Circuit Court of Appeals, the ancillary suit was likewise appealable to that court.

Railroad Commission of Ohio vs. Worthington,
187 Fed. Rep., 965, 968.

This holding of the Circuit Court of Appeals as to

the ancillary nature of a Bill of Complaint such as that filed in the present case was correct.

White vs. Ewing, 159 U. S., 36.

Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.

Ex parte Tyler, 149 U. S., 164.

Compton vs. Jessup, 68 Fed. Rep., 263 (C. C. A., 6th Circuit, 1895).

Toledo, etc., Ry. Co. vs. Continental Trust Co., 95 Fed. Rep., 497 (C. C. A., 6th Circuit, 1899).

(2) If the appeal to the Circuit Court of Appeals was properly taken and perfected, as above indicated, then the subsequent direct appeal, even though proper if taken earlier, was void and of no effect because of the previous appeal to the Circuit Court of Appeals.

Cincinnati, Hamilton, etc., Railroad Co. vs. Thiebaut, 177 U. S., 615.

Columbus Construction Co. vs. Crane Co., 174 U. S., 600.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS FINAL, UNLESS IT MAY PLEASE THIS COURT TO ALLOW A WRIT OF CERTIORARI.

A. THE JURISDICTION OF THE CIRCUIT COURT IN THE ORIGINAL CASES IN WHICH B. A. WORTHINGTON WAS APPOINTED RECEIVER OF THE WHEELING & LAKE ERIE RAILROAD COMPANY WAS BASED ON DIVERSITY OF CITIZENSHIP.

See I, B (1), *supra*, p. 7.

An appeal in the ordinary course in those cases, therefore, would lie only to the Circuit Court of Appeals, and the decision of the Circuit Court of Appeals would be final.

Judiciary Act of March 3rd, 1891, Section 6.

B. THE BILL OF COMPLAINT BY THE RECEIVER TO INSTITUTE THIS SUIT IN THE CIRCUIT COURT WAS AN ANCILLARY BILL.

See I, B (1), *supra*, p. 7.

C. THE FINALITY OF A DECISION OF THE CIRCUIT COURT OF APPEALS IN A SUIT ARISING OUT OF AN ANCILLARY BILL DEPENDS UPON WHETHER OR NOT ITS DECISION IN THE MAIN SUIT WOULD BE FINAL.

There can be no doubt of the soundness of the preceding statement as a general proposition of law as the same has been repeatedly and invariably held by this Court whether the ancillary bill be supplemental, intervening or original in form.

Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.

Rouse vs. Letcher, 156 U. S., 47.

Rouse vs. Hornsby, 161 U. S., 588.

Carey vs. Houston, etc., Ry. Co., 161 U. S., 115.

Gregory vs. Van Ee, 160 U. S., 643.

Third Street, etc., Ry. Co. vs. Lewis, 173 U. S., 457.

In the case first above cited the opinion of the court reads thus in part, on p. 577:

“* * * and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final.”

It may be urged, however, that granting that the bill which instituted the present suit was an ancillary one, it contained another jurisdictional averment which gives the right to carry this case on appeal from the Circuit

Court of Appeals to this Court, namely, the averment that a law of the State of Ohio was claimed to be in violation of the Constitution of the United States.

In answer to this contention, however, we refer to the first division of this brief, in which we attempted to show to this Court the reasons why the original bill did not make such a claim or properly set out any such jurisdictional averment.

See I, A, *supra*, p. 5.

For a second answer to the above supposed contention, we refer the Court also to the well-established rule of law that the appellate jurisdiction in any given case is determined by the jurisdictional averments made by the complainant in his Bill of Complaint, and that the subsequent interjection of issues, which if originally made would have extended the appellate jurisdiction, cannot vary the appellate jurisdiction which attached at the time of the filing of the Bill of Complaint.

Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.

Press Publishing Co. vs. Monroe, 164 U. S., 105.

Bagley vs. General Fire, etc., Co., 212 U. S., 477.

Third Street, etc., Railway Co. vs. Lewis, 173 U. S., 457.

St. Louis, etc., Railroad Co. vs. Wabash Railroad Co., 217 U. S., 247.

In the cases of *Press Publishing Company vs. Monroe* and *Bagley vs. General Fire, etc., Co.*, just cited, it was held that the interjection into the suit by the defendant of Constitutional or Federal statutory questions could not prevent the decisions of the Circuit Court of Appeals from being final in cases in which the complainant had based his case on diversity of citizenship. The

syllabus of *Third Street, etc., Railway Company vs. Lewis*, just cited, reads:

“A decree of the Circuit Court of Appeals in a case in which the jurisdiction at the outset depended on diversity of citizenship is final, even if another ground of jurisdiction was alleged in a supplemental bill by which a new defendant was made a party.”

The first syllabus of *St. Louis, etc., Ry. Co. vs. Wash Railroad Company*, last above cited, also reads as follows:

“The decree of the Federal Circuit Court, entered pursuant to the mandate of a Circuit Court of Appeals, upon a petition to enforce rights granted by a decree in intervention proceedings in a foreclosure suit, is not appealable to the Federal Supreme Court where the jurisdiction of the original foreclosure suit was based solely upon diversity of citizenship, although, when the case went back from the Circuit Court of Appeals to the Circuit Court, the latter court authorized an amendment to the petition, alleging that the decree ordered by the Circuit Court of Appeals failed to give full faith and credit to the original decree in the intervention proceeding.”

It is not contended that any of the preceding citations are precisely in point on the proposition that under no possible circumstances can an ancillary suit be ultimately appealed to this Court where the main suit could not be so appealed. The generality and breadth of the language used in the opinions handed down by this Court, however, and the nearness with which the actual decisions of this Court approach to holding this proposition are such that we deem it advisable to submit the same to the consideration of this Court.

III.

A DECISION OF THIS COURT ON THE ISSUES DECIDED BY THE CIRCUIT COURT OF APPEALS IS OF SO MUCH IMPORTANCE AND CONCERN, NOT ONLY TO THE PARTIES HERETO, BUT TO OTHER RAILROADS AND SHIPPERS AND TO THE GENERAL PUBLIC, THAT WE FEEL JUSTIFIED IN REQUESTING THIS COURT TO GRANT THE WRIT PRAYED FOR.

St. Louis, etc., Railway Co. vs. Wabash Railroad Co., 217 U. S., 247, 251.

Without launching out into a general discussion of the significance and importance of the main question at issue in the present case, to-wit, the jurisdiction to regulate the rate on the so-called lake coal traffic on The Wheeling & Lake Erie Railroad, it seems sufficient to state that there has for many years been dissatisfaction with the rate charged by the carriers for the transportation of this coal; that there has also been a long existing difference of opinion as to the authority properly empowered to regulate the rate or charge on this traffic; that as a step toward the determination of this question, proceedings resulting in the order of the Railroad Commission of Ohio were begun before that body in the year 1909; that a complaint seeking a reduction in the charge imposed for the carriage of this traffic is also now pending before the Interstate Commerce Commission; that the determination of the proper authority to regulate the rate on the traffic in question must in the very nature of things ultimately be made by this Court; that the de-

cision of this question in the case now presented to this Court will, therefore, prevent long and expensive litigation on the part of others; and that the early determination of this question by this Court in this case will conduce greatly to the general commercial stability in the coal trade and other business incident thereto, for the reason that the amount of the so-called lake coal carried annually over The Wheeling & Lake Erie Railroad alone from the Ohio coal field is over one-half million tons, while over three million tons of this coal are carried on other railroads from the Ohio field.

IV.

SINCE THIS CASE IS ALSO PENDING IN THIS COURT ON APPEALS FROM BOTH THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS, THE ALLOWWANCE OF THE WRIT OF CERTIORARI PRAYED FOR WILL MAKE IT UNNECESSARY FOR THIS COURT TO ENTER UPON A LABORIOUS EXAMINATION OF THE RECORD OF THIS CASE FOR THE PURPOSE OF DETERMINING THE PRECISE AND TECHNICAL MANNER IN WHICH THIS CASE SHOULD BE PRESENTED TO THIS COURT FOR ITS CONSIDERATION.

Montana Mining Company vs. St. Louis Mining, etc., Co., 204 U. S., 204, 213.

On the page of the report just indicated, Mr. Justice Brewer uses the following language in the course of the opinion:

“As either by writ of error or certiorari the decision of the Court of Appeals can be brought be-

fore this court, and as each has been applied for, and as the importance of the case seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a Federal question involved, or the jurisdiction depended solely on diverse citizenship. The writ of error was duly allowed prior to the filing of the record in the first instance, and, to avoid any further question of our jurisdiction, we allow the certiorari."

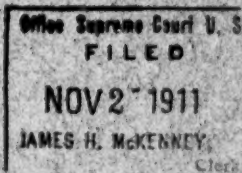
Your petitioner, the appellant herein, therefore, respectfully submits that it will be a proper exercise of the discretion of this Court to allow the Writ of Certiorari prayed for in the petition herein.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio,
Attorney for Appellant.

FRANK DAVIS, JR.,
CHAS. C. MARSHALL,
T. H. HOGSETT,
Of Counsel.

Supreme Court of the United States.

October Term, 1911.
No. 776.



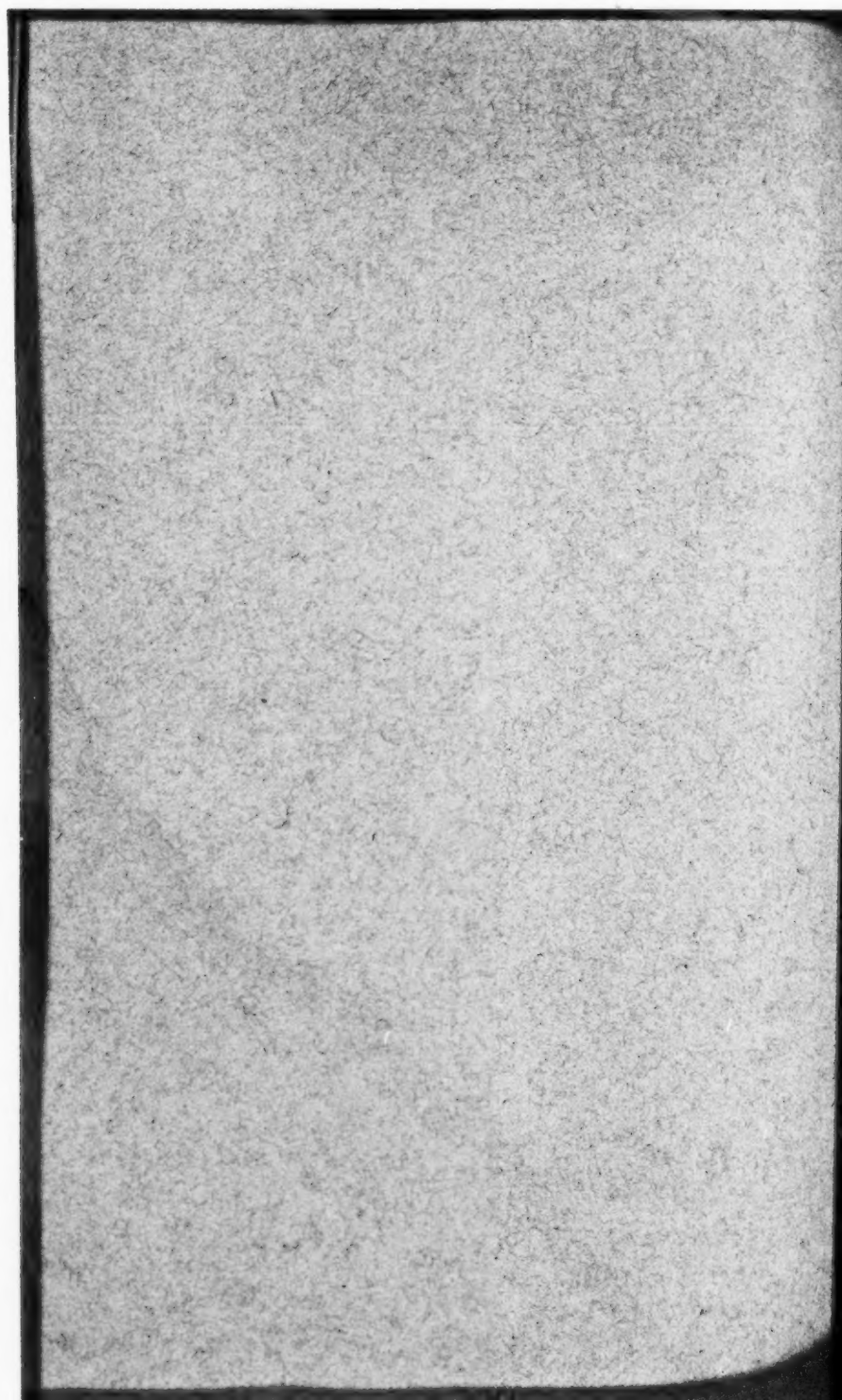
**RAILROAD COMMISSION OF OHIO,
APPELLANT,**

vs.

**B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,
APPELLEE.**

**Brief on Behalf of Respondent Upon Petition for Allowance
of a Writ of Certiorari.**

**WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.**



Supreme Court of the United States.

October Term, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

APPELLEE.

**Brief on Behalf of Respondent Upon Petition for Allowance
of a Writ of Certiorari.**

WM. B. SANDERS,

W. M. DUNCAN,

Counsel for Respondent.

Supreme Court of the United States.

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vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,
APPELLEE.

**Brief on Behalf of Respondent Upon Petition for Allowance
of a Writ of Certiorari.**

I.

Statement of the Case.

(a)

THE PROCEEDINGS.

The petitioner seeks the allowance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, by which that court affirmed a judgment rendered by the Circuit Court for the Northern District of Ohio, Eastern Division, in a proceeding to enjoin the Railroad Commission of Ohio from enforcing its order fixing the rate charged by the railroad for the service rendered by it in the transportation of what is known in the trade as "lake cargo coal."

The Circuit Court found with the complainant Receiver on the issues joined, and enjoined the Railroad Commission of Ohio from enforcing the order, *because the rate in controversy applied only to coal transported*

from a point in the State of Ohio to a point outside of the State of Ohio, and was therefore an interstate rate, and was not subject to the relegateory power of the State of Ohio. The Circuit Court did not consider the other grounds attacking the validity of the order set forth in the bill of complaint, deeming it unnecessary in view of the conclusion reached respecting the character of the commerce to which the rate applied. C. C. of A. Printed Record, page 118.)

The Railroad Commission of Ohio perfected an appeal to the Circuit Court of Appeals, Sixth Circuit, from such judgment and decree of the Circuit Court. Subsequently, the Receiver filed in the Circuit Court of Appeals a motion to dismiss the appeal, claiming that appeal did not lie to the Circuit Court of Appeals, but direct to the Supreme Court, because the jurisdiction of the Circuit Court was invoked on the ground that a law of the State of Ohio, to-wit, the order of the Railroad Commission of Ohio, violated the United States Constitution. The Circuit Court of Appeals overruled the motion, holding that the proceeding attacking the validity of the rate was ancillary to the main proceeding in which the Circuit Court had taken possession of the property through the intervention of its Receiver, jurisdiction in which case was based upon diversity of citizenship of the parties. *The Circuit Court of Appeals then proceeded to hear the case upon its merit, and having reached the same conclusion as to the effect of the testimony and the character of the commerce to which the rate in controversy applies, sustained the judgment and decree of the Circuit Court. 187 Fed., 965, at page 966.*

After the respondent herein had filed in the Circuit Court of Appeals his motion to dismiss the appeal, but

before same was heard, the petitioner herein undertook to perfect an appeal to this Court direct from the Circuit Court. This appeal is Cause No. 505, October Term, 1911, entitled, "Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver, Appellee." After the Circuit Court of Appeals had passed upon the motion to dismiss, as stated above, the petitioner herein undertook to perfect an appeal from the Circuit Court of Appeals to this Court. This appeal is Cause No. 776, October Term, 1911, same title as in said Cause No. 505. The petition for writ of certiorari has been filed in said Cause No. 776.

(b)

THE FACTS.

This controversy grows out of a complaint originally filed with the Railroad Commission of Ohio by the Pittsburgh Vein Operators' Association, whose members own or operate coal mines in what is known as the Pittsburg No. 8 Ohio coal district, situated in Jefferson, Harrison, and Belmont Counties, attacking the reasonableness of the existing rate charged by the Receiver of The Wheeling & Lake Erie Railroad Company on "lake cargo coal" from the No. 8 Ohio district to the hold of vessels at Lake Erie ports for shipment to points beyond the State of Ohio. (C. C. of A. Record, pages 30 to 33, inclusive.)

The Railroad Commission of Ohio heard the complaint, notwithstanding the protest of the railroad company that the rate applied only to interstate commerce engaged in by the parties, and on February 28, 1910, made an order fixing the rate on said "lake cargo coal" from the No. 8 District of Ohio to Lake Erie ports, f. o. b. vessels at said ports (C. C. of A., Printed Record,

page 35). Thereupon, the Receiver of the railroad filed a bill of complaint to enjoin the Railroad Commission of Ohio from enforcing the order on the ground as stated above. Testimony offered on behalf of the parties showed, as was contended by the Receiver of the railroad company and as found by the Circuit Court, that lake cargo coal consists only of coal transported from mines in the State of Ohio to points in the vicinity of the head of the Great Lakes outside the State of Ohio via rail to points in Ohio known as lower lake ports and thence by vessel to points at the head of the Great Lakes known as upper lake ports; that the transportation of such lake cargo coal is one entire transaction participated in by the shipper, the railroad company and the vessel under a common arrangement, whereby each party performs its respective duties necessarily incident to such interstate transportation, to-wit, the shipper furnishes the coal and arranges for the vessel transportation, the railroad company carries the coal by rail from mines to lower Lake Erie ports and unloads the coal into the vessel so engaged by the shipper to transport the coal up the Great Lakes, the vessel performs the vessel carriage and consents to the performance by the railroad company of an unloading service in the hold of the vessel, and that each party in performing its respective duty acts as a link in the interstate transportation intended by all to be carried on, each link being necessary and essential to the accomplishment of the common purposes of the parties, namely, the transportation of coal from the No. 8 District of Ohio to the head of the Great Lakes. (See allegations of bill of complaint, C. C. of A., Record, pages 8 to 11, inclusive; and the finding of the Circuit Court with the complainant on the issues thus joined, C. C. of A., Record, page 118.)

II.

ARGUMENT.

In the brief filed on behalf of the petitioner, counsel claim that appeal to the Circuit Court of Appeals was properly taken and admit the finality of that court's decision. We, therefore, confine our remarks to the points contained in the third and fourth parts of petitioner's brief stating the petitioner's reasons for the issuance of the writ.

It is submitted the writ should be denied, for the following reasons:

(a) The record does not disclose any question of law in regard to which there is not a uniformity of ruling. The exclusive jurisdiction of the Federal Government over rates applicable to interstate commerce is well established. *Wabash, etc., Railway Company vs. Illinois*, 118 U. S., 557; *Fargo vs. Michigan*, 121 U. S., 230, at page 247; *Philadelphia & S. S. Company vs. Pennsylvania*, 122 U. S., 326, at page 338; *Corington, etc., Bridge Company vs. Kentucky*, 154 U. S., 204, at page 219; *Dow vs. Beidelman*, 125 U. S., 680; *Interstate Commerce Commission vs. Railway Company*, 167 U. S., 479; *Louisville & Nashville, etc., Co. vs. Eubank*, 184 U. S., 27.

The petitioner does not claim that the Railroad Commission of Ohio has any power to regulate interstate rates. On the contrary, the petitioner, in opposing the motion to dismiss filed by the respondent herein, urged that the bill showed, if it showed anything, that the act of the Railroad Commission was *ultra vires*, because the Ohio Railroad Commission Act limited the jurisdiction of the Commission to intrastate transactions. The Circuit Court of Appeals adopted this view, using the following language (187 Fed. Rep., at page 970):

"We are constrained to agree with the court below in its conclusion that the order of the Commission was beyond its powers. *The law of Ohio defining its authority confined its functions to intrastate transactions, and gave it no authority to interfere with interstate commerce. The fault is not in the law, but in the Commission's failure to observe the limitations imposed upon it.* It follows that its order is not one sanctioned by the laws of the State and derived no force or validity from its assumption of a power not delegated to it by the Legislature. * * * There is not here, therefore, a controversy as to whether a state law is in conflict with the Constitution or any law of the United States." (Italics ours.)

(b) The record shows that the determination of the controversy depended upon the determination of an issue of fact, that is, the circumstances and conditions surrounding and the arrangement under which lake cargo coal is transported.

The Receiver of the railroad company claimed that the transportation of lake cargo coal (to which the lake cargo rate applied) constitutes one entire transaction, participated in by shipper, the railroad company and the vessel carrier, whereby each party performs its respective duty in the transportation of coal from mines in Ohio to points at the head of the Great Lakes outside of the State of Ohio; that is, the shipper furnishes the coal and arranges for the vessel transportation, the railroad carries the coal from the mines to Lake Erie ports by rail and unloads it into holds of vessels engaged by the shipper, the vessel performs the water carriage and consents to the service by the railroad company of unloading the coal into the holds of the vessels; and each party in performing its respective duty acts as a link in the interstate transportation intended by all to be

carried on, each link being necessary and essential to the common purposes of the parties, namely, the transportation of coal from the No. 8 District in Ohio to the head of the Great Lakes (Circuit Court of Appeals Record, pages 8 to 11, inclusive).

The Railroad Commission of Ohio, on the other hand, claimed that the rail portion of the service performed by the Receiver of the railroad company in connection with the transportation of lake cargo coal was a separate and distinct transaction performed wholly in the State of Ohio, and therefore subject to state regulation (C. C. of A. Record, pages 58, 59 and 60). The Circuit Court examined the testimony submitted by the parties in support of the issues thus joined and found with the Receiver of the railroad company. The decree of the Circuit Court reads in part as follows (C. C. of A. Record, page 118):

“* * *, and the court after due consideration and being fully advised in the premises finds with the complainant on the issues joined with reference to the character of such commerce and that the allegations of the bill of complaint respecting the character of the commerce to which the lake cargo rate is applicable are true, that the lake cargo rate involved in this controversy applies only to coal transported from a point in the State of Ohio, to-wit, the No. 8 District, to a point outside the state, * * *.”

The Circuit Court of Appeals reached the same conclusion as the Circuit Court respecting the probative effect of the testimony offered by the Receiver of the railroad. On this point the Circuit Court of Appeals say (187 Fed. Rep., 965, at page 968):

“At the hearing in the Circuit Court, on the pleadings and proofs, Judge Tayler presiding, it was (as appears from his opinion sent up with the

record) found, upon the recital of the facts *as gathered from the evidence*, that the rate of 70 cents per ton was intended to apply to lake cargo coal destined for transportation to the upper lake ports—that is, to ports in other states—and to such transportation only. *We are satisfied, upon an examination of the evidence upon that point, that the conclusion of the learned judge upon that point was correct.*” (Italics ours.)

(c) It is a well-settled rule of this Court that the concurrent decisions of two subordinate courts upon questions of fact will be followed unless shown to be erroneous.

The Carib Prince, 170 U. S., 655.

Court say, page 658:

“The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. *Compania La Flecha vs. Brauer*, 168 U. S., 104, and a case there cited; *Stuart vs. Hayden*, 169 U. S., 1; *Baker vs. Cummings*, 169 U. S., 189, 198. As, after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to.”

(d) No showing is made either in the petition for a writ of certiorari or brief of petitioner that the conclusions reached by the Circuit Court and Circuit Court of Appeals as to the probative effect of the testimony are erroneous. So far as this proceeding is concerned, we submit that the Court is justified in accepting the decisions of the two lower courts and applying the general rule so often announced that “this court will

not reverse the concurring decisions of two subordinate courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions."

(c) The application for this writ is allowed only in cases which fall "within the category of questions of such gravity and general importance as to require the review of conclusions of the Circuit Court of Appeals in reference to them." *In Re Woods*, 143 U. S., 205; *Lau Ow Baw, Petitioner*, 141 U. S., 583; *American Construction Company vs. Railway Company*, 148 U. S., 372.

The record does not show any question falling within the category of questions of importance and general interest. The record discloses a not unusual situation in connection with the transportation of a commodity from a point in one state to a point in another state by means of rail and vessel carriers, and there is nothing unusual in the fact that the transportation facilities of the rail carrier in this instance are located entirely within the State of Ohio. It is settled beyond question that such a situation does not exempt the rail carrier from regulation when it undertakes to utilize its transportation facilities in connection with the transportation of merchandise from a point in one state to a point in another. See *Wabash Railway Company vs. Illinois*, 118 U. S., 557, and cases cited above under sub-division (a) hereof.

The Circuit Court and the Circuit Court of Appeals in disposing of the controversy found with the Receiver of the railroad on the issue of fact as to the circumstances and conditions under which the Receiver of the railroad company participated in the transportation of lake cargo coal from a point in one state to a point outside that state, and then applied the

well-settled rule above stated, viz., that the regulation of rates on interstate commerce is vested in the Federal Government, pointing out that this very limitation was recognized in the Ohio statute creating the commission, because the statute affirmatively limits the power of the Ohio Commission to *intrastate* transactions.

(f) Inasmuch as the petitioner urges the granting of the writ upon the ground that the decision of this question will prevent long and expensive litigation and "conduce greatly to the general commercial stability in the coal trade" (although there is no fact to support the general statement), it may be well to call the Court's attention to that which does not appear on the record as presented by the petition, but which the respondent offers to prove at such time as the Court may desire.

The northwestern part of the United States in the vicinity of the Great Lakes obtains a large portion of its supply of coal from Pennsylvania, West Virginia and Ohio. The coal moving from such originating points moves to lower Lake Erie ports by rail and from thence to ports at the head of the Great Lakes by vessel. Coal transported in this way, as stated above, is known as "Lake Cargo Coal." Lake cargo coal moving from Ohio competes in the northwest with lake cargo coal similar in quality from the Pennsylvania and West Virginia districts. The rail rates from the districts in these various states are based upon a differential in favor of Ohio.

There is now pending before the Interstate Commerce Commission four cases, involving the readjustment of the lake cargo rate from the states of Pennsylvania, West Virginia and Ohio to lower Lake Erie ports for trans-shipment via vessel to points at the head of

the Great Lakes. (a) The first case is "Investigation and Suspension Docket No. 26," entitled "In the Matter of the Investigation of Increase in Coal Rates by Carriers Serving the West Virginia Coal Fields," and involves the rate on lake cargo coal from West Virginia. [REDACTED] The Wheeling & Lake Erie Railroad Company, is a party to this cause. (b) The second case is No. 3853, entitled "John W. Boileau vs. The Pittsburgh & Lake Erie Railroad Company, et al.," and involves the rate on lake cargo coal from the Pittsburgh district. The Wabash, Pittsburgh Terminal Railway Company, with which the respondent's railroad connects and serves the Pittsburgh district, is a party to this proceeding. (c) The third and fourth cases are brought by the same complainant, and involve the rate on lake cargo coal from the No. 8 Ohio District, the subject matter of this controversy. *The complainant is The Pittsburgh Vein Operators' Association*, the members of which own and operate mines in the No. 8 District of Ohio, *the same complainant attacking the reasonableness of the rates involved in this controversy when the matter was pending before the Railroad Commission of Ohio*; one case is directed against the Pennsylvania Company exclusively and the other against The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its receiver; the Commission for some time past has been, and still is investigating the various complaints aforesaid, although no testimony has as yet been taken in the Ohio case.

In the complaint against the receiver of The Wheeling & Lake Erie Railroad Company, filed with the Interstate Commerce Commission, as aforesaid, are found the following allegations:

“* * * said Receiver has been, and now is, engaged in the carriage and transportation of coal from the No. 8 field * * * in the State of Ohio, to certain ports on the southern shore of Lake Erie, * * * both located within the State of Ohio, which said coal at said ports * * * has been and now is transferred to lake vessels, and has been and now is carried on said lake vessels to points in other States * * *; that said coal so shipped from said mines to said lower lake ports for trans-shipment by water * * * is and for a long time has been transported by said defendants and each of them, under a contract of carriage, by the terms of which said defendants * * * agree to transport said coal in car-load lots from said mines to said lower lake ports * * *, and there unload the same upon vessels to be supplied * * * by said shippers * * *, and * * * distribute said coal in the holds of said vessels, * * * it being further understood that said shippers will furnish lake vessels for the transportation of said coal by water to points in other States * * *.” (See Article 2 of the petition.)

And also the following:

“That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States * * * with said coal so shipped and transported from said West Virginia and said Kentucky coal fields, and competes in said northwestern coal markets with said West Virginia and Kentucky coal; * * *.” (See Article 7 of said complaint.)

And also the following:

“* * * said defendant Receiver, * * * have been and now are giving to the West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; * * *.” (See Article 9 of said complaint.)

Under such circumstances it is but fair to presume that the Interstate Commerce Commission will in the

near future readjust the rates and fix the differentials between the various lake cargo coal-producing districts, and thus produce that "general commercial stability in the coal trade" desired by the real party in interest in this controversy, namely, the coal operators in the No. 8 Ohio District. We therefore submit that the case does not present a situation of such general importance as to require a review of the conclusions of the Circuit Court of Appeals.

For the above reasons the petition should be denied.

Respectfully submitted,

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1911.
No. 776.

Office Supreme Court, U.
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JAMES H. MCKENNE

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND THE UNITED STATES CIR-
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OHIO, EASTERN DIVISION.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

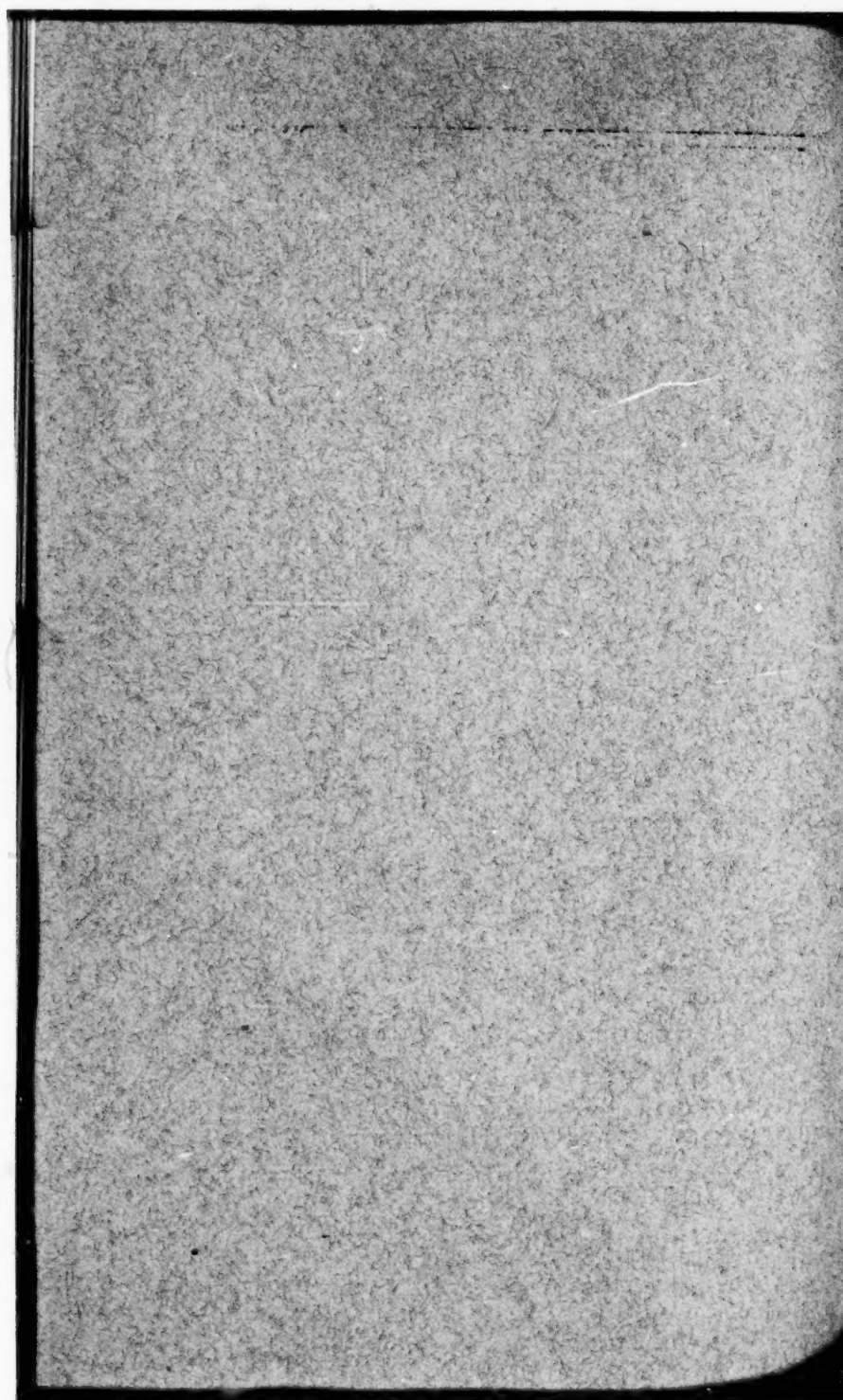
vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,
APPELLEE.

BRIEF FOR APPELLANT.

TIMOTHY S. HOGAN,
Attorney General of the State of Ohio;

FRANK DAVIS, JR.,
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T. H. FOGSETT,
Attorneys for Appellant.



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INDEX.

STATEMENT OF CASE	1
EXTRACTS FROM RECORD	8
SPECIFICATION OF ERRORS	21
BRIEF AND ARGUMENT	25
The Railroad Commission of Ohio Has Jurisdiction Over the Transportation Under Consideration	25
The Interstate Commerce Commission Has Not Jurisdiction	82
The Decision of the Court Below.....	93
Conclusion	101

TABLE OF CASES CITED.

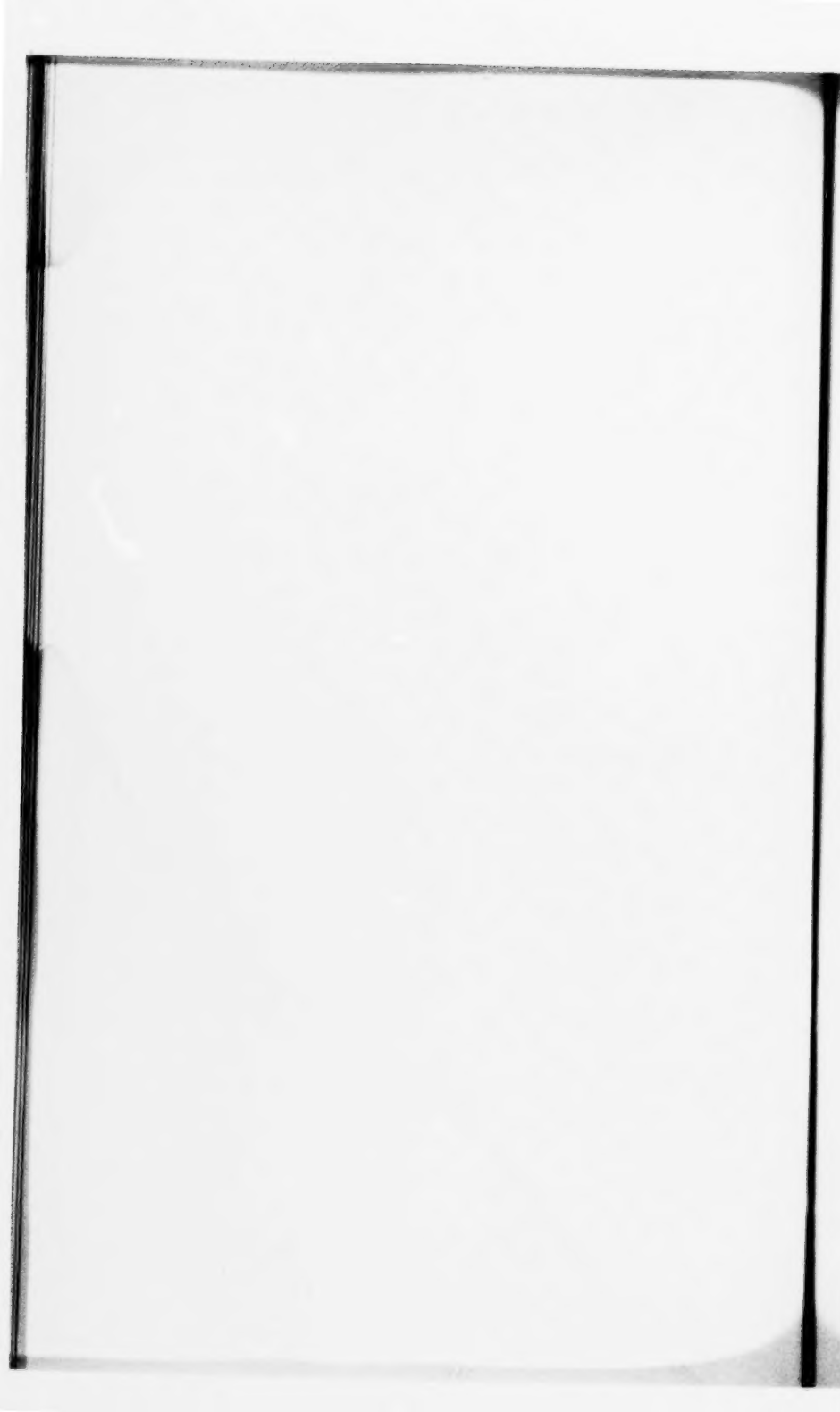
Armour Packing Co. vs. United States, 209 U. S., 56.	88
Augusta Brokerage Co. vs. Central of Georgia Ry. Co., 62 So. Rep., 996	62
Ball, The Daniel, 10 Wall., 557, 565	26
Carrier vs. Gordon, 21 O. S., 605.....	37
Chesapeake & Ohio Ry. Co., et al. (In the Matter of Transportation by The), Interstate Commerce Commission, No. 3863	74, 87
Chicago, etc., Ry. Co. vs. Becker, 32 Fed. Rep., 849...	40
Chicago, etc., Ry. Co. vs. Railroad Commission of Indiana, 87 N. E. Rep., 1030	55

Cincinnati, etc., Railroad Co. vs. Interstate Commerce Commission, 162 U. S., 184.....	45
Coe vs. Errol, 116 U. S., 517.....	34
Cutting vs. Florida Ry., etc., Co., 46 Fed. Rep., 641..	44
Daniel Ball, The, 10 Wall, 557	26
Diamond Match Co. vs. Village of Ontonangon, 183 U. S., 82	47
Dobbs vs. Louisville, etc., R. R. Co., 18 I. C. C. Rep., 210	64
Elbertson vs. Chicago & St. P., etc., Co., 2 Wis. R. R. Com. Rep., 593	47
Ex Parte Koehler (Receiver), 30 Fed. Rep., 867....	42
Ft. Worth, etc., Ry. Co. vs. Whitehead, 26 S. W. Rep., 172	44
Gulf, etc., Ry. Co. vs. State of Texas, 204 U. S., 403..	56
Goodrich Transit Co. vs. Interstate C. C., 190 Fed. Rep., 943	86
Heiserman vs. Burlington R. R. Co., 63 Ia., 732.....	33
Hope Cotton Oil Co. vs. Texas Pac. Ry. Co., 12 I. C. C. Rep., 266	60
Houston Direct Navigation Co. vs. Insurance Co. of North America, 30 L. R. A., 713.....	45
Interstate C. C. vs. Bellaire, etc., Ry. Co., 77 Fed. Rep., 942	86
Kansas City, etc., Ry. Co. vs. Brooks, 105 S. W. Rep., 93	61
Koehler, Ex Parte, 30 Fed. Rep., 867	42
Kurtz vs. Pennsylvania Co., 16 I. C. C. Rep., 410....	63

Laning-Harris Coal, etc., Co. vs. Missouri Pacific Ry. Co., 13 I. C. C. Rep., 154.....	60
Larabee Flour Mills Co. vs. Missouri Pacific Ry. Co., 74 Kansas, 808	52
Minneapolis, etc., Railroad Co. vs. State of Minn., 186 U. S., 257	46
Missouri, etc., Co. vs. Cape Girardeau, etc., Railroad Co., 1 I. C. C. Rep., 30	43
Missouri Pacific Ry. Co. vs. Larabee Flour Mills Co., 211 U. S., 612	54, 96
Mutual Transit Co. vs. United States, 178 Fed. Rep., 664	84
New Jersey Fruit Exchange vs. Central Railroad of New Jersey, 2 I. C. C. Rep., 142	43
Noble vs. Chicago, St. P., etc., Ry. Co., 1 Wis. R. R. Com. Rep., 767	47
Oregon Railroad & Navigation Co. vs. Campbell, 180 Fed. Rep., 253	69
People of New York vs. Knight, 192 U. S., 21.....	48
Porter vs. St. Louis & Southeastern Ry. Co., 95 S. W. Rep., 453	61
Rosenbaum (J.) Grain Co. vs. Chicago, etc., Ry. Co., 130 Fed. Rep., 46	47
Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S., 498.....	76, 78
Southern Ry. Co. vs. United States, U. S. Sup. Ct., Oct. 30, 1911	30
Texas & New Orleans Railroad Co. vs. Sabine Tram Co., 121 S. W. Rep., 256	65

Texas & Pacific Railway Co. vs. Interstate Commerce Commission, 162 U. S., 197, 212	88
Texas & Pacific Ry. Co. vs. Railroad Commission of Louisiana, 183 Fed. Rep., 1005	76
Texas & Pacific Ry. Co. vs. Taylor, 126 S. W. Rep., 1117	68
Texarkana, etc., Ry. Co. vs. Sabine Tram Co., 129 S. W. Rep., 198	68
United States vs. Colorado, etc., Railroad Co., 157 Fed. Rep., 321	52
United States vs. Geddes, 131 Fed. Rep., 452.....	49, 97
United States ex rel. vs. Chicago, etc., Ry. Co., 81 Fed. Rep., 783	86
United States ex rel. vs. Lehigh, etc., R. R. Co., 115 Fed. Rep., 373	86
Wells-Higman Co. vs. Grand Rapids, etc., Ry. Co., Interstate Commerce Commission No. 2270	68
White vs. St. Louis, etc., Ry. Co., 86 S. W. Rep., 962..	51
Wood, etc., Co. vs. Galveston, etc., Co., 130 S. W. Rep., 857	68





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APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case is a consolidated one, consisting of two appeals involving identical issues, one appeal being from the United States Circuit Court of Appeals for the Sixth Circuit and the other from the United States Circuit Court for the Northern District of Ohio, Eastern Division. The suit in which these two appeals had their common origin was instituted in the United States Circuit Court for the Northern District of Ohio, Eastern Division, by the filing of a bill in equity by appellee herein, B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, in which bill the Railroad Com-

mission of Ohio, appellant herein, was made a defendant and in which bill complainant sought to enjoin the enforcement of a certain order theretofore made, entered and served by said Railroad Commission fixing and establishing a rate on so-called lake cargo coal transported by rail by complainant from the No. 8 coal field in Eastern Ohio to the Ports of Huron, Ohio, and Cleveland, Ohio, for trans-shipment by lake vessels. The Circuit Court allowed the injunction prayed for on the ground that the coal traffic in question constituted interstate commerce, the rate on which should be regulated by the Interstate Commerce Commission. Thereupon the Railroad Commission of Ohio perfected an appeal to the Circuit Court of Appeals for the Sixth Circuit, but being fearful, because of the uncertain meaning and dual nature of some of the jurisdictional averments in the complaint, that it might ultimately be held that said appeal should have been taken direct to the Supreme Court of the United States, an appeal was thereafter prosecuted direct to this Court, said direct appeal being case No. 505, on the docket of this Court for the October Term, 1911. Subsequent to the perfecting of said direct appeal the case as appealed to the Circuit Court of Appeals for the Sixth Circuit came on for hearing and said Circuit Court of Appeals held, over the objection of appellee, that it had jurisdiction on said appeal and affirmed the decree of the court below. The present case, No. 776, October Term, 1911, is an appeal from the decision of the Circuit Court of Appeals for the Sixth Circuit, with which appeal this Court on motion of appellant consolidated said direct appeal in case No. 505. Further, lest it might be held that this case was of such a nature that no appeal lay to this Court from the Circuit Court of

Appeals, a petition for Writ of Certiorari and brief in support thereof were filed herein some months ago, upon which petition this Court has as yet taken no action.

Upon whatever basis or theory this Court may assume jurisdiction, there is but one question made, and that is whether or not the Railroad Commission of Ohio, by its order, interfered with interstate commerce in such a manner as to contravene the Commerce Clause of the Constitution, more accurately described as Article 1, Section 8 of the Constitution of the United States.

In order that this Court may properly understand the question at issue, it is, therefore, necessary to define and describe the transportation affected by the order of the Railroad Commission of Ohio, together with the circumstances surrounding the same, and this we shall proceed to do as briefly as may be:

The so-called No. 8 coal field comprises an extensive deposit of bituminous coal, consisting of approximately two and one-half billion tons, underlying an area of about one-half million acres, and located in the counties of Belmont, Jefferson and Harrison, in the eastern part of the State of Ohio. The coal produced in this field is essentially a steam coal and is disposed of by the operators or producers therein generally speaking in three different ways which have given three different names to the coal thus disposed of, though all of the coal produced is of the same kind and quality, viz.: (1) Commercial coal, or that which is sold direct to the various mills and factories. (2) Railway fuel coal, or that which is disposed of to the railroads, principally for locomotive consumption. (3) Lake cargo coal, or that which is shipped by rail to the lower Lake Erie ports and there transferred to lake vessels on which the same is carried to various

points on the Great Lakes, where the same is used for manufacturing or railway purposes.

In addition to the above a considerable amount of this No. 8 coal is consumed by the lake vessels, such coal being known as "vessel fuel" coal. Of the coals just described, it is the third division or what is known as "lake cargo" coal, whose transportation from the No. 8 coal field in Eastern Ohio to the Ports of Huron and Cleveland, Ohio, is affected by the order of the Railroad Commission of Ohio.

This lake cargo coal is mined in connection with the railway fuel coal, the commercial coal and the vessel fuel coal above described, all these coals being of the same quality, and during the season of navigation is forwarded to the lake front in large quantities over The Wheeling & Lake Erie Railroad (Rec., p. 82), together with the surplus coal not needed for railway fuel or commercial purposes (Rec., pp. 90, 92).

When the coal operators or shippers determine to send certain cars of coal to the lake, these cars are marked "lake coal" (Rec., p. 84), and are shipped over the railroad operated by the appellee, under a contract of carriage which covers transportation only from one point in Ohio to other points in Ohio, to-wit, Huron and Cleveland, and the delivery at these other points to the shippers or their agents (Rec., pp. 83, 92).

The contents of most of the cars thus sent to the lake front are as a matter of fact ultimately carried by vessel to points in the Northwest in states other than Ohio (Rec., p. 94), and there marketed chiefly by the vendees of the No. 8 coal operators (Rec., pp. 85, 92).

The cars of No. 8 coal, billed to Cleveland and Huron as lake coal, whose contents do not ultimately reach

the Northwest in regular order are principally, (1) Those diverted to other destinations and uses *en route* Huron (Rec., pp. 84, 87). (2) Those interchanged by the operators with each other at Huron. (3) Those sold by the operators to each other at Huron (Rec., p. 93). (4) Those whose contents are used at Huron for vessel fuel (Rec., p. 82).

The rate established and published by The Wheeling & Lake Erie Railroad Company in connection with this traffic for several years has covered both the compulsory service of transportation and the independent voluntary service of unloading (Rec., p. 29), which latter service includes "trimming" or distributing the coal in the hold of the vessel by men or machinery (Rec., p. 78), though formerly the rate published included only the transportation up to the dock or unloading machine (Rec., p. 87).

Contracts for the sale of part of this lake coal are frequently made by the operators before the coal is mined (Rec., p. 84); contracts for the sale of other parts of this lake coal are made by the operators after this coal has arrived at Huron (Rec., pp. 86, 87, 89, 93).

Under some of these contracts delivery of the coal is to be made and is made f. o. b. vessel Huron and title to and risk in the property passes to the purchaser when the vessel is loaded with the coal (Rec., pp. 85, 87). Under others of these contracts delivery to the purchaser is to be made in the Northwest and title to the coal remains in the operator or shipper and the coal is delivered by The Wheeling & Lake Erie Railroad Company to said operator or shipper at Huron, Ohio, in vessels which the shipper charts or leases and over which he has absolute control (Rec., 85, 93).

When this lake coal is shipped from the mines it is not known whether any car or train of coal will be appropriated to existing or future contracts, as above distinguished, whether said coal will be delivered to the shippers or to the vendees of said shippers at Huron or Cleveland, as above explained, or to what point or points the contents of any car or train will ultimately be sent, or on what vessel or vessels the same may be carried (Rec., pp. 83, 84, 92).

Lake coal is shipped to Huron and Cleveland by the operators without regard to whether or not it is time for the delivery of coal under existing contracts (Rec., p. 90); that is, the operators in a way, anticipate demands for vessel shipments and estimate the amount which they will probably need at the lake front and ship the same to that point accordingly (Rec., p. 90), thus making the lake front a sort of assembling point for this coal. The coal for various reasons frequently stands on the cars in the yard at the lake front for quite a period of time. Seven days' free time are allowed the shippers, and if the coal is detained for a greater length of time than that, a demurrage charge of so much per day is imposed by the railroad company (Rec., p. 96). After the coal arrives in the yards at the lake front, it is subject to the order of the operator or shipper (Rec., pp. 83, 92), and when the order is given to the railroad to load a certain vessel with a certain kind of coal, no particular cars are designated in the order to the railroad, whose employees select the cars most readily accessible and load the same on the vessel (Rec., p. 84).

No car or cars of said lake coal are appropriated to any purchaser until after the selection of cars of a particular kind has been made from the general mass of

cars in the yard and loaded aboard vessel and until that time the coal in every case remains the property of the operator or shipper (Rec., p. 84).

No arrangement or understanding of any kind, expressed or implied, exists between the vessel carrier and the rail carrier. The Wheeling & Lake Erie Railroad Company and its Receiver do not even know what kind of an arrangement the shipper or purchaser makes with the water carrier, do not know what vessel is to take the coal, to what point any vessel is to take it or what is to be paid the vessel for carrying the coal (Rec., pp. 85, 86, 88, 93, 95).

The operator or shipper in behalf of himself or in behalf of his vendee, contracts separately for the vessel transportation under an agreement independent of and separate from his agreement with the Railroad Company (Rec., pp. 84, 85, 88), and makes said vessel contract sometimes before and sometimes after the coal to be carried by said vessels has arrived at the lake front (Rec., p. 92), and makes out the bill of lading for said vessel cargoes (Rec., p. 86).

The Railroad Commission of Ohio, after a full consideration of the matter, determined that it had jurisdiction to regulate the rate on the transportation of this coal to the lake front, and, therefore, made an order declaring the existing rate of 90c per ton unjust and unreasonable and directing that thereafter a rate of 70c per ton, which the Commission found to be a just and reasonable rate, should be charged for said services, and the question now before this Court is whether or not in making such an order the Railroad Commission of Ohio unconstitutionally interfered with commerce between the states.

EXTRACTS FROM RECORD.

In order that the Court may see at a glance certain parts of the record herein which support a number of the general statements contained in the foregoing "statement of the case," we give below certain excerpts from the record.

TESTIMONY OF MR. MAURER (coal operator in the No. 8 field), Record, p. 82:

"Mr. Hogsett: Now, Mr. Maurer, you ship coal from your mines to Huron and what other points on the Wheeling & Lake Erie?

Mr. Maurer: Only to Huron. We have shipped to Cleveland, but they are taking no coal there at this time.

Mr. Hogsett: That coal, or a part of it at least, is afterwards transported to various points on the great lakes?

Mr. Maurer: Part of it; part of it is used for vessel fuel.

Mr. Duncan: It takes another rate, doesn't it?

Mr. Maurer: Yes.

Mr. Hogsett: I wish you would explain to the Commission how your shipments from the mines of what is designated as lake coal, are made?

Mr. Maurer: On the Wheeling & Lake Erie the coal is weighed at the mine. The shipping clerk at the mine telephones the shipment into the office at Dillonvale, I mean the Wheeling & Lake Erie billing office at Dillonvale. Then in the evening, after the day's work is done, he makes out a mine report, one copy of which he sends to the agent at Dillonvale, one copy goes to Mr. Booth, of the Wheeling & Lake Erie, and one copy comes to our office.

Mr. Duncan: Who is it makes this report?

Mr. Maurer: The shipping clerk at the mine.

Mr. Duncan: Your shipping clerk?

Mr. Maurer: Yes, and this is a copy of the report that comes to our office, to Mr. Booth's office, and to the Wheeling & Lake Erie Agent at Dillonvale (producing same)."

Record, page 83:

"Mr. Hogsett: Now, go ahead with your answer.

Mr. Maurer: You refer to lake coal?

Mr. Hogsett: Yes.

Mr. Maurer: You understand that the lake coal referred to is lake coal that goes to Huron. It is consigned to the Glens Run Coal Company at Huron. If we have various grades of coal, we designate some of the office employes in whose name the coal is shipped. For example, if we were shipping mine run coal, we might call it S. B. Cooledge coal, or if we were shipping inch and a quarter lump, we might ship it to C. E. Sullivan in care of the Glens Run Coal Company, the name being for the purpose of designating the different grades of coal, and when we desire this coal loaded, we would notify the Wheeling & Lake Erie to load a certain vessel with C. E. Sullivan's coal, or Glens Run Coal or S. B. Cooledge coal, and that would simply indicate the grade of coal that was to be loaded on the vessel.

Commissioner Hughes: Can they be mixed?

Mr. Maurer: They can be mixed if we wanted to, but ordinarily we try to get a complete cargo on one grade of coal.

Mr. Hogsett: *At the time this coal is shipped from the mine does any person know where the ultimate destination of that coal is beyond Huron?*

Mr. Maurer: *We do not."*

* * * * *

Record, page 84:

"Mr. Maurer: *When the coal leaves the mine it is simply marked 'Lake coal' and is consigned to Huron. At the time of shipment we do not know what boat will take it or to what point it will go, or whether en route part of it may not be reconsigned for some other purpose, or whether part of the coal will be used for fueling boats. That is no distinct car moved to any particular place or to any particular ultimate destination.*

Mr. Hogsett: Other than Huron?

Mr. Maurer: Other than Huron. I may say when a boat is loaded we do not designate what cars shall be loaded on the boat, but the railroad company goes out and picks up sufficient cars of that grade of coal to load the boat.

Commissioner Hughes: Is this coal all subject to reconsignment at any time after it leaves the mines; that is do you hold that right or power to reconsign the coal?

Mr. Maurer: The coal all belongs to the Glens Run Coal Company after it arrives at Huron.

Commissioner Hughes: And it is subject to reconsignment at any time.

Mr. Maurer: Subject to reconsignment.

Mr. Duncan: I do not think the witness understands the question of the Commissioner.

Mr. Maurer: I certainly do."

* * * * *

Record, page 85:

"Mr. Hogsett: Right in that connection, Mr. Maurer, *let me ask you whether or not there is any portion of that coal delivered to the purchasers f. o. b. vessel at Huron?*

Mr. Maurer: *Practically all delivered to the purchasers f. o. b. vessel at Huron*, although you may make a price at the other end, but as far as our shipments are concerned, we nearly always make them f. o. b. Huron or Cleveland.

Mr. Hogsett: Then where is it delivered f. o. b. vessel at Huron, those orders are orders given to the vessel owners?

Mr. Maurer: Yes; we call it a charter confirmation.

Mr. Hogsett: You do that for the purchaser of your coal?

Mr. Maurer: Yes; we do that for the purchaser of the coal. We charter the boats. We sometimes agree in selling the coal that we will take care of the charter. That is ordinarily the case that we will

take care of the furnishing of vessels and the chartering.

Mr. Hogsett: You mean by furnishing the vessel making the arrangement with the vessel owner?

Mr. Maurer: Yes.

Mr. Hogsett: For the use of the vessel to ship the cargo in?

Mr. Maurer: Yes; to ship the cargo in.

* * * * *

Mr. Hogsett: *What, if anything, does the rail shipment have to do with, or what connection has the rail shipment with the water movement?*

Mr. Maurer: *Absolutely none whatever.*

Mr. Hogsett: *What relation is there, if any, between the rail carrier and the water carrier?*

Mr. Maurer: *None whatever.*

Mr. Hogsett: *They are under a separate contract entirely?*

Mr. Maurer: *Yes.*

Mr. Maurer: If the Commission will let me go on, I can explain the whole transaction. After the vessel is loaded sometimes the Wheeling & Lake Erie call up and notify us that the boat has cleared and has been loaded with so many tons of coal, but ordinarily we wait until we get a report of this kind (producing same) from the dock superintendent at Huron showing the boat, the date she was loaded and the number of cars and the tonnage.

Mr. Duncan: Are you offering that in evidence?

Mr. Hogsett: We will offer it.

Mr. Maurer: Upon the receipt of that notice usually the first thing to do is to insure the cargo. Then we make out a bill of lading in this form (producing same) showing the destination, showing the name of the boat, showing the number of tons and the kind of coal, the rate of freight, consigned by ourselves as the consignor.

Mr. Hogsett: The lake freight, you mean?

Mr. Maurer: Yes; the lake freight. Then we mail this bill of lading to the consignee at Ashland or Duluth, as the case may be, mailing him two or

three copies of the bill of lading, one of which he hands to the captain of the boat on his arrival there, and on that bill of lading the captain collects the freight. Sometimes that is done at the other end and sometimes at this end.

Commissioner Hughes: *Is the coal that you land on the dock there always sold before you land it?*

Mr. Maurer: *No; it may be shipped and sold afterwards. When anybody wants a certain amount of coal we take it out of the bunch. There may be three or four or five hundred cars of coal there, and somebody calls up and says, 'We want five hundred of this' or 'six hundred of that grade of coal.'*

Commissioner Hughes: That coal then is subject to reconsignment?

Mr. Maurer: Yes.

Commissioner Hughes: And may be sold after it is delivered on the dock?

Mr. Maurer: Part of it may be sold. Sometimes we have a bunch sold beforehand."

* * * * *

Record, page 87:

"Commissioner Gothlan: When the tariff formerly read f. o. b. dock, did the consignee then get a loading cargo?

Mr. Maurer: On some of the roads it is f. o. b. dock now.

Commissioner Gothlan: Who pays the loading charge, the shipper or the consignee?

Mr. Maurer: On the Pennsylvania road in Cleveland we pay the loading charge. Then at the end of the season all the charges of the dock company are turned over to Mr. Greist, the auditor of the Pennsylvania Company, who goes over them and O. K.'s them, then the dock company rebates to us whatever the difference is between the figures we pay and the figures Mr. Greist adopts. They run from probably 3½ cents per ton up to 6 cents.

Commissioner Gothlan: That is when the rate reads f. o. b. docks?

Mr. Maurer: Yes. Some of those docks are leased by the railroad companies to other parties who operate the docks. And in a case of that kind we pay the dock companies and ordinarily the railroad company dictate how much they shall charge.

Mr. Duncan: That is, they reimburse the shippers what is presumed to be an equitable profit made out of the operation of the dock?

Mr. Maurer: Yes.

* * * * *

Mr. Hogsett: Now, Mr. Maurer, *you may state whether or not you dispose or sell any of this coal after it has been taken to Huron?*

Mr. Maurer: *We dispose of a great deal of it after it has been taken to Huron''.*

* * * * *

Record, page 89:

“Mr. Hogsett: That is the way some of your coal is disposed of?

Mr. Maurer: Yes.

Mr. Hogsett: Some portion of it is sold during the season and delivered from the coal that you have accumulated or assembled at Huron?

Mr. Maurer: We estimate, as I said before, the tonnage. When I say tonnage that does not mean the tonnage we sell, but the tonnage we figure we will be able to ship and be able to dispose of. This tonnage may not be over two-thirds sold, but we simply figure what we will probably sell and we have the coal; we cover sufficient coal to take care of that.

Mr. Hogsett: That is merely an estimate of what you may be able to sell during the season?

Mr. Maurer: Merely an estimate.

Mr. Hogsett: Then your shipments to Huron, the assembling point of your coal, is based upon what you estimate you may be able to dispose of during the season?

Mr. Maurer: Yes, sir.

Commissioner Gothlan: Going back for a minute, there is one point the commission is not clear

on. *I believe you stated you shipped to the port right along whether you have orders or not?*

Mr. Maurer: *We always keep a quantity of coal on the dock; provided we have any lake shipments whatever.*

Mr. Arnold: *That is you have the cars on the dock?*

Mr. Maurer: *We keep the cars on dock or substantially on the dock; they are along the line of the railroad some place.*

Commissioner Gothlan: *Briefly what is the reason you ship that way instead of waiting until you have orders for the coal?*

Mr. Maurer: *In order to have the coal. It is a large quantity ordinarily that you sell at one time. For example a boat of ten thousand tons' capacity—an order for ten thousand tons would require a boat of that capacity. To accumulate that much coal and take care of your business unless you had a very large mine would mean three or four weeks before you could accumulate it.*

Commissioner Gothlan: *You anticipate that?*

Mr. Maurer: *Yes, we anticipate that. And we ship that what we term our surplus coal. For example, we are running today and we have ten cars left over, and if we had no consignee in Ohio or other points that surplus would go to the lakes to await orders for shipment up the lakes. But you understand we have orders. We have a certain tonnage sold all the time.*

Mr. Arnold: *Still quite often such shipments were made when there are no sales for lake shipment at all?*

Mr. Maurer: *Yes. Simply to get rid of the coal, without the sign of an order."*

Record, page 72:

"Mr. Duncan: Now, going back to this transportation of coal from the number eight district to the northwest territory, as I understand you, some of your coal proceeds from the mine without being

sold or before you have made a contract of sale?

Mr. Maurer: Sometimes—quite frequently, yes, sir.

Mr. Duncan: But the estimate that has governed your contract with the transportation company is presumed to cover what in your judgment as a coal man think will be your lake shipment for that year, providing you can get the transportation companies to contract up that high.

Mr. Maurer: If you will put the horse at the other end of the cart, you will have it right.

Mr. Duncan: I will put it the other way then.

Mr. Maurer: *This year we have shipped 25,000 tons to the lakes before we had any vessel contract, and that is done very frequently.*

TESTIMONY OF MR. OSBORNE (coal operator in the number 8 field), Record, p. 91:

“Mr. Hogsett: State to the Commission how that is done?

Mr. Osborne: For the sake of handling our coal with the least possible trouble and expense to the railroad we take some of our office men and while—we perhaps do it a little different from some of the rest, because we ship a great deal of Pennsylvania coal and other Ohio coals to the lake front, and we will take one man, if you please, and consign him to a certain port—take Lorain. We will send, say S. H. Robbins, who will take all of those grades of coal consigned to that point. He will take lump, run of mine, nut or slack, whichever it may be. When we order the boats we will order—give notice to the railroad that, for instance the Hiawatha will be for loading about such a date. Sometimes it is a little shorter than that time and sometimes it overruns—depends upon the speed of the unloading of the boat; and tell them that S. H. Robbins for three-quarter, and they will get that coal ready—giving them sufficient time to run it down to the docks, so that they can handle the coal at the best possible

operation for them and the least delay to the boat possible.

* * * * *

Mr. Hogsett: State those conditions.

Mr. Osborne: We take our coal—in the first place we fill up our mines with orders that we may have to deliver—of rail orders. *Then the surplus of those different grades of coal we may order to the lake front, and it is just about on the same line as pouring in from four or five different mines, different streams into a tub, and then, as we want a cargo of coal, we take an order out of that tub—a dipper full of whatever we want for the boat and the freight we pay to the lake front, and the vessel arrangements we make either by direct contract with the vessel concerned or we take a chance—what I mean by a chance, we keep out a certain percentage of our coal that is not contracted with any boat line and then we utilize a spot boat. For instance, that tub is getting full. The railroad company is going to shut off that coal running in there. So if we can get a spot boat, we rush it out and dip it out and let it go on.*

Mr. Hogsett: When this coal is shipped from the mines it is consigned, as you have stated, to some person in the employ of your company?

Mr. Osborne: *Be consigned to one of our employes with the understanding that the railroad company that it is our coal when we pay the freight.*

Mr. Hogsett: *At the time it is shipped from the mines does your company know where any particular car load or train load of coal will finally go?*

Mr. Osborne: *Absolutely no; absolutely not.* Unless it would be some time that there was a boat at the dock and a shortage of coal, then we would be after the railroad to rush that coal; that is a very exceptional case now, because there is plenty of coal at the lake front.

Mr. Hogsett: This coal is delivered to the purchaser, your purchaser, where, usually?

Mr. Osborne: When we purchase coal?

Mr. Hogsett: No, to the purchaser.

Mr. Osborne: Well, we do that any way the fellow will take it; give him any kind of medicine he wants on it. The coal is sold very largely f. o. b. boat at the lake front and that is all the basic price is, your coal f. o. b. at the lake front. Sometimes we will sell a man a block of coal at the lake front and he will request us to take a charter. We will take a chance on it or we may contract his coal.

Mr. Hogsett: Does it ever occur that your company purchases from another company coal that it has assembled or accumulated at the lake front, either Huron or Cleveland or those other ports?

Mr. Osborne: Yes, we have purchased coal at the lake front—purchased from different roads, among them the Wheeling & Lake Erie. I think we purchased some this spring from the Wheeling & Lake Erie at the lake front, number eight field coal.

Mr. Hogsett: That is you mean you purchased from the Wheeling & Lake Erie shippers?

Mr. Osborne: Yes, sir; Wheeling & Lake Erie road shippers.

* * * * *

Mr. Hogsett: Was that coal that had been shipped to the lake port?

Mr. Osborne: That had been shipped to the lake port?

Mr. Hogsett: Had it been sold when it was shipped?

Mr. Osborne: No, sir; they solicited us to take it, and we bought it at a very cheap price, an inducement to move it.

Mr. Hogsett: How much was there of that, Mr. Osborne, do you remember now?

Mr. Osborne: My recollection when they called up they had about five thousand tons and we told them if they would increase the cargo up to the point that we could get a boat for it, I think in the neighborhood of six to seven thousand tons, we would take it.

Mr. Hogsett: Now, Mr. Osborne in the shipments of this coal from the mines and in the shipments subsequently made by boat I will ask you to *state whether or not there is any connection at all between the rail carriage and the water carriage?*

* * * * *

Mr. Osborne: *There is no connection whatever. It is absolutely our coal. We pay the freight rates, the lake freight and make our own vessel arrangement and everything."*

* * * * *

Record, page 94:

"Mr. Duncan: Now what you say that you do not know where the coal is to go that comes from the mine you mean you do not know to what point in the northwest each particular car of coal that is sent up to this bucket or tub at the lakes is to go?

Mr. Osborne: Either that or train load.

Mr. Duncan: Or train loads?

Mr. Osborne: Yes, sir.

Mr. Duncan: But you are pouring it all into the tub?

Mr. Osborne: Sure.

Mr. Duncan: To be taken out?

Mr. Osborne: Yes.

Mr. Duncan: And distributed in the northwest?

Mr. Osborne: To be taken to our dock or some other places on some other order that may come in.

Mr. Duncan: It does not of necessity go to the northwest, does it?

Mr. Osborne: No, no.

Mr. Duncan: Well, all of the coal that goes in there that takes the lake rate goes to the northwest, doesn't it?

Mr. Osborne: No, some of it goes to Detroit, some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Mr. Duncan: You pay the local rate if you divert it?

Mr. Osborne: Yes, and take your demurrage charges, too.

Mr. Arnold: Go to the Islands in Lake Erie—

Mr. Osborne: No—Kelley's Island you mean?

Mr. Arnold: Yes.

Mr. Osborne: I have none of that order.

Mr. Arnold: If any of that coal was sent from Huron to Kelly's Island it would take the same lake rate?

Mr. Osborne: Sure, if it would go into the river and be sunk it would take the same rate.

Mr. Arnold: I mean for shipping from lake ports to other points in Ohio it would still take the lake rate?

Mr. Osborne: Yes, any point in Ohio.

Mr. Arnold: That is all."

TESTIMONY OF B. A. WORTHINGTON (Receiver of Wheeling & Lake Erie Railroad Company), Record, p. 94:

"Mr. Hogsett: Mr. Worthington, has the Wheeling & Lake Erie Railroad Company, or you, as Receiver of that company, any contract or arrangement for the transportation of this lake coal with any lake carrier?

* * * * *

Mr. Worthington: No contract excepting the tariff rate of ninety cents f. o. b. vessel.

Mr. Hogsett: Is that with the lake carriers?

Mr. Worthington: No, that is with the shipper. The shipper furnishes the boat into which we load the coal.

Mr. Hogsett: *I am asking you whether or not you have any contract with the lake carrier?*

Mr. Worthington: *Not that I know of.*

Mr. Hogsett: Well, you are in the management and control of the property and you know what the contracts are, don't you?

Mr. Worthington: No; the shipper furnishes the boat and the shipper makes his own arrange-

ments for shipping coal by vessel to the lake and our tariff is ninety cents f. o. b. vessel, and when he gives us instructions, we load the coal onto the boat and he charters the boat or makes his own arrangements for shipping the coal up to the head of the lakes.

Mr. Hogsett: *There is no arrangement between your railroad and the lake carrier?*

Mr. Worthington: *Not directly.*

Mr. Duncan: I object to the form of the gentleman's question. I do not know whether he means a direct arrangement or an indirect arrangement.

Mr. Worthington: No direct arrangement.

Mr. Hogsett: What do you mean by "no direct arrangement"?

Mr. Worthington, *Well, if the fact that the shipper furnishes the boat and arrangements to contract for the boat is not an indirect arrangement, why we have no arrangement."*

TESTIMONY OF MR. TITUS (Assistant Superintendent of Wheeling & Lake Erie Railroad Company), Record, page 96:

"Mr. Maurer: Explain what the seven days' demurrage was, so that the Commission may understand it?

Mr. Titus: Well, the average was seven days.

Mr. Maurer: The average of what; explain it so that the Commission will understand it.

Mr. Titus: To make it short, if you loaded two hundred cars on a boat, some of those cars might have been delayed thirty days, and some of them twenty, and some of them five, and the average of of those two hundred cars was not to be over seven days; otherwise, there was a demurrage.

Mr. Maurer: That is, if you brought two hundred cars to the lake, and one hundred of them were loaded at the end of fourteen days and the other hundred got there the day they were loaded, there would be no demurrage?

Mr. Titus: None whatever.

Mr. Maurer: That made the average of seven days?

Mr. Titus: Yes.

Mr. Maurer: What was the charge per car, Mr. Titus?

Mr. Titus: One dollar a day.

Mr. Maurer: And that one dollar was extra, beyond the rate?

Mr. Titus: Yes.

Mr. Maurer: For every day?

Mr. Titus: Yes."

SPECIFICATION OF ERRORS.

Briefly and generally stated the error complained of and relied on by appellant herein consists of the conclusions of the courts below that the transportation of the lake cargo coal in question constitutes interstate commerce over which the Railroad Commission of Ohio has no jurisdiction, and of the decree based on such conclusions made and entered by the United States Circuit Court for the Northern District of Ohio, Eastern Division and affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, that the enforcement of the order of the Railroad Commission of Ohio establishing the rate on that commerce be perpetually enjoined.

For exact reference, however, we state below the specifications of error made with respect to the decision and decree of each of the above named courts:

Assignment of Errors in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division (Rec., p. 105).

Comes now the defendant, the Railroad Commission of Ohio, and files the following assignment of errors, upon which it will reply upon its prosecution of its appeal from the decree made by this

Honorable Court on the 25th day of June, 1910, in the above entitled cause, and says; that the findings and decree in said cause are erroneous and against the just rights of said defendant, for the following reasons:

1. That the court erred in its finding for the plaintiff on the issue joined with reference to the character of the commerce to which said lake cargo rate is applicable.

2. That the court erred in its finding that the lake cargo rate involved in this controversy applied only to coal transported from a point in the State of Ohio, to-wit: the Number Eight District to a point outside the state.

3. The court erred in finding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged by the complainant for the services rendered by said complainant in the transportation of said lake cargo coal.

4. Said court erred in not finding and holding, upon a consideration of all the evidence, that the movement or transportation of said Number Eight Lake coal from said mines in said Counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said City of Cleveland and to said village of Huron, both in the State of Ohio, was an intra-state movement, and therefore, within the jurisdiction of the Railroad Commission of Ohio.

5. The court erred in ordering, adjudging and decreeing that said order of the Railroad Commission of Ohio made and entered on the 28th day of February, 1910, is void and of no effect.

6. Said court erred in enjoining and prohibiting the defendant railroad commission of Ohio from instituting, authorizing and directing any suit, action or actions for the purpose of putting its said order of February 28th, 1910, into effect or from enforcing the provisions of said order.

7. That said court erred in granting the prayer of the complainant in said suit and entering a final decree therein against this defendant.

*Assignment of Errors in the United States Circuit
Court of Appeals for the Sixth Circuit.*

(Rec., p. 116.)

The appellant in the above entitled cause in connection with its petition for appeal herein, presents and files therewith this assignment of errors as to which matters and things it says that the decree entered herein on the 2nd day of May, A. D. 1911, is erroneous, to-wit:

First. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of said Circuit Court for the Northern District of Ohio, Eastern Division that the commerce to which said lake cargo rate is applicable is interstate commerce.

Second. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the findings of said Circuit Court for the Northern District of Ohio, Eastern Division that said lake cargo rate applies only to coal transported from a point in the State of Ohio, to-wit, the Number Eight District, to a point outside of the State of Ohio.

Third. That said Circuit Court of Appeals for the Sixth Circuit erred in not finding and holding upon a consideration of all the evidence that the movement or transportation of said Number Eight lake coal from said mines in said counties of Jefferson, Belmont and Harrison, all in the State of Ohio, to said city of Cleveland and said Village of Huron, both in the State of Ohio, was an intrastate movement or transportation.

Fourth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that the Railroad Commission of Ohio has no power to prescribe the rate or rates to be charged for the services rendered in the transportation of said lake cargo coal.

Fifth. That said Circuit Court of Appeals for the Sixth Circuit erred in holding and deciding that said order of the Railroad Commission of Ohio, establishing rates for the movement or transportation of said lake cargo coal, is void and of no effect.

Sixth. That said Circuit Court of Appeals for the Sixth Circuit erred in not holding and deciding that said Railroad Commission of Ohio had power to prescribe the rate to be charged for services rendered in the transportation of said lake cargo coal and in not holding and deciding that said order of said Railroad Commission of Ohio is legal and binding on appellee herein.

Seventh. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Eighth. That said Circuit Court of Appeals for the Sixth Circuit erred in not reversing the decree of the Circuit Court for the Northern District of Ohio, Eastern Division.

Ninth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the decree of the Circuit Court for the Northern District of Ohio, Eastern Division, which said decree declared that said order of appellant entered on the 28th day of February, 1910, was void and of no effect.

Tenth. That said Circuit Court of Appeals for the Sixth Circuit erred in affirming the order of said Circuit Court for the Northern District of Ohio, Eastern Division, enjoining appellant from instituting, authorizing and directing any suit, action or actions for the purpose of putting said order of said appellant, made February 28, 1910, into effect.

BRIEF AND ARGUMENT.

THE ORDER OF THE RAILROAD COMMISSION OF OHIO DOES NOT CONSTITUTE AN UNCONSTITUTIONAL REGULATION OF INTERSTATE COMMERCE, FOR THE REASON THAT THE TRANSPORTATION AFFECTED BY THE RATE IS PURELY AN INTRASTATE MOVEMENT.

As shown by the foregoing statement there is a demand for coal in the region tributary to the upper ports on the Great Lakes. The Ohio coal operators desire to participate in supplying that demand by shipping coal up the lakes or by selling and delivering the same at the Lower Lake ports to those who desire to take it up the lakes themselves. To get this coal to the lake vessel requires a rail haul from the mines to the lake front. This rail service the appellee, among others, undertakes to perform. The rail service is absolutely independent of the water service and no vestige of any common arrangement between the rail and water carrier for a through or continuous service exists. The cargo coal is shipped in car load lots to the Lake Front, in a general and indeterminate manner, along with other coal destined to the points of trans-shipment without regard to what disposition of this coal shall be made on its arrival at those points. When ordered, the appellee unloads the cargo coal on a vessel designated by the shipper or by the consignee, delivers the lake fuel coal to the same or a different vessel, switches the commercial coal to the proper point and thereafter renders his bill to the shipper, charging one rate for hauling the cargo coal, another for the lake fuel coal and another for the commercial coal, the lowest charge being made for the cargo coal, which charge the Railroad Commission of Ohio found unrea-

sonable, no complaint having been made to that Commission as to the other rates. The service performed by the appellee in the transportation of lake cargo coal is under a tariff published by him and quoting a rate only to the Lower Lake Ports. The coal is billed only to those points and is there re-delivered to the shipper or his agents or vendees aboard a vessel, procured by the shipper or his agent or vendee, when for the first time any specific mass of coal is appropriated to any shipment beyond the State of Ohio, and even then the vessel load of coal may be ordered conveyed to whatsoever point the shipper or his vendee may desire, the rail carrier having nothing whatever to do with the situation or arrangement. The owners or purchasers of this coal by the foregoing procedure effect a distinct and independent transfer of the same from the mines to the lake front in anticipation of a second and different transportation by water which is to begin at the lake front and end in another state, and they also by the very provisions of their contract with the rail carriage arrange for a separate transportation local to the State of Ohio.

It is, therefore, contended by appellant herein that the transportation of the coal in question is an intra state movement, the regulation of the charge on which by the Railroad Commission of Ohio constitutes no unlawful interference with interstate commerce, notwithstanding the disclosed intention or independent arrangement of the shipper or his vendee to later convey the coal by water to another state and there dispose of the same.

The more important of the numerous decisions bearing most directly on this contention will now be taken up and discussed, for the most part, in chronological order.

The Daniel Ball, 10 Wall. (U. S.), 577 (1871), is per

haps the earliest case to which it is advisable to refer specifically in connection with the present discussion. At the time that case arose there was a United States statute which made it unlawful for a vessel to transport merchandise or passengers on the navigable waters of the United States without a Federal license. The *Daniel Ball* was a vessel operating without such a license on the navigable waters of the United States between two points in the State of Michigan and carrying goods, some of which were "marked for places in other states than Michigan" and some of which came from other states than Michigan. In an action for a violation of the license regulation it was ultimately held that the vessel was liable.

Of the correctness and soundness of this conclusion no one, so far as we can recall, has ever expressed the slightest doubt, yet because of certain language of which Mr. Justice Field made use in the opinion in that case it is probably safe to say that few cases decided by this Court have been more frequently discussed and referred to.

The language to which we refer is as follows:

"There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. *Gibbons vs. Ogden*, 9 Wheat., 194, 195. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river

goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

With respect to the language just quoted it may be remarked, in the first place, that the question of whether or not the boat in question must procure a license did not depend upon whether or not any of the articles conveyed by it were in interstate commerce. To this point we shall refer later. In the second place, it may be observed that the language in question is such that if taken in one sense, every person who has ever thought on this subject will at once agree with what is said; while if the language is taken in another sense, many of the courts and legal writers disagree with it.

Cooke, Commerce Clause of the Federal Constitution, p. 55.

In other words, if the language above quoted means that whenever a commodity has been released into a channel of interstate commerce by the owner or possessor thereof under a complete arrangement for the uninterrupted movement of that commodity to another state, then all will agree that the commodity in question is an article of interstate commerce from the time it begins to move. If, on the other hand, that language means that whenever the owner or possessor of a commodity arranges for a preliminary movement thereof to another point in the same state, with the intention of ultimately transporting that same commodity under a new arrangement, as yet unmade, into another state, the commodity is from the beginning of the first movement an article of interstate commerce, then many of the courts have been and we are now unwilling to subscribe to such an interpretation of the language in question.

It is our position in this case that in order for a commodity to become an article of interstate commerce, it must have a prescribed destination beyond the state of its origin and that until it begins a movement to that definite and prescribed destination under an arrangement effected for that entire movement, the article in question does not become one of interstate commerce.

Now we have just stated that the language in question constituted a dictum and was uttered with respect to a question not necessary to be passed on in connection with the decision of the case under consideration. That this statement is true and that any vessel plying on the navigable waters of the United States is amenable to Federal regulation, regardless of the nature of its cargo, is now generally admitted and for a discussion of the proper basis of this case we again make reference to the treatise of Mr. Cooke at the page just referred to.

If any other authority than those referred to is necessary to support the proposition that Federal regulation over a vehicle traversing a highway of interstate commerce is independent of the nature of the contents of the vehicle, it is found in one of the very recent decisions of this Honorable Court.

Southern Railway Co. vs. United States, decided October 30, 1911.

This, as is well known, is a decision under the provisions of the so-called "Safety Appliance Act" of March 2, 1903, and in substance holds that a railroad which is operated as part of a through highway over which traffic is continually being moved from one state to another, must provide all of the cars operated on its railroad with the appliances called for by the Act, regardless of the character of the contents of the cars as to their inter- or intrastate nature.

Now, as was said with respect to the decision in *The Daniel Ball* case, so it should be observed with respect to the decision in the safety appliance case, that no other conclusion could be regarded as sound or as protecting interstate commerce or those engaged therein from the carelessness of the owners or operators whose vehicles frequented the highway.

But we call attention most emphatically to the fact that the decisions in these two cases—for it seems to us that the Safety Appliance case simply decided as to interstate rails what *The Daniel Ball* case long ago decided as to interstate waters—do not touch the real point at issue in the present case. These cases decided that regardless of the character of the article of commerce being conveyed, the conveyance in which the articles are transported is subject to Federal supervision, the reason

for such decisions being that thus only can the lives of those actually engaged in interstate transportation be properly protected. In the case which we are now discussing, however, the primary question is whether or not the coal under consideration is in interstate commerce on its preliminary movement to the lake front under a severable contract of carriage, or, stating the question in general, what is yet undecided by this Court is whether or not transportation as such which is separately arranged for between two points within the same state is subject to Federal regulation because another carrier under another contract is later to transport the commodity to another state.

Indeed, instead of militating against the contention of the appellant herein, we suggest that the recent Safety Appliance decision gives an added reason for holding that the rail carriage of the No. 8 lake cargo coal is intrastate commerce. Reference to the Safety Appliance Statutes discloses that the statute of 1901 imposed upon every carrier engaged in interstate commerce by railroad, the duty of equipping all trains, locomotives and *cars used on its line of railroad "in moving interstate traffic,"* and that the statute of 1903 enlarged the scope of the former Act by declaring, among other things, that its provisions "*should apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce * * *.*" (Italics ours.)

As will be shown by cases discussed later herein, under the Safety Appliance Act of 1901 there has been a difference of opinion in the minds of the courts as to whether or not that Act applied to cars carrying articles on a bill of lading reading from one point to another in the same state, when the goods were in fact marked to

or bound to or from another state. Even by those decisions under the former statute which held that cars carrying such commodities must be equipped as required by the Federal statute, no great hardship or inconvenience was imposed on a small railroad whose termini were within the same state and whose traffic in goods originating in or ultimately destined for other states was small, for the reason that a limited number of cars could be set aside and dedicated to that particular use.

When we come, however, to extending the present Safety Appliance Statute to all of the cars and equipment of every railroad engaged in interstate commerce, it at once becomes apparent that the scope of Federal control would be extended to a surprising and unnecessary extent if it should be held that every local state railroad which occasionally carries on its rails, in the performance of its mandatory duty, commodities billed between two points in that state, but which have originally come from or are ultimately bound to another state, must provide for every article of its equipment in the manner prescribed by the Federal statute. It is obvious that under the present Safety Appliance Statute it will sooner or later become necessary for the courts to define what is a railroad engaged in interstate commerce, and if any railroad which transports an article in interstate commerce is to be considered as a railroad engaged in interstate commerce, then it would seem that the courts should hesitate to hold that a local state railroad operated as just described must comply with the Federal statute. To so hold would require a narrow gauge railroad whose termini were both within the State of Ohio, whose rolling stock, because of its gauge, could not leave the local rails and which occasionally trans-

ported between two points within the State of Ohio on a local bill of lading an original package of Milwaukee beer which it had received from The Baltimore and Ohio Railroad, which in turn had received the same from its northwestern connection at Chicago, to equip every appliance operated by it in the manner provided by the Safety Appliance Act. This, we submit, would be going too far, and we suggest that it would be more proper only to require such a railroad to conform to the Safety Appliance Act when by some sort of traffic or other through arrangement it has voluntarily made provision for a continuous haul from or to a point beyond the state of its actual operation.

In *Heiserman vs. Burlington Railroad Co.*, 63 Ia., 732 (1884), certain grain was shipped on a local rail carrier from one point in Iowa to another and delivered at the latter point to a connecting carrier to be transported by it to Milwaukee, Wisconsin.

The bill of lading of the initial carrier, however, bound it only to carry the grain to the second point within the state and limited its liability to that part of the journey, but showed on its face that the initial carrier was to deliver the grain to The Chicago, Milwaukee & St. Paul Railway Company at its junction point with the initial carrier within the State of Iowa, and that The Chicago, Milwaukee & St. Paul Railway Company was to transport the grain in question to Milwaukee. In an action to recover freight charges in excess of those established by the State Statute the court ruled that the carriage in question was intrastate and that, therefore, the requirements of the State Statute were binding, for the reason that the contract of the carrier was completely performed by the delivery of the grain to the connect-

ing carrier and that, therefore, the local law must govern, notwithstanding the fact that it was patent to all parties to the transaction that the ultimate destination of the grain was Milwaukee and notwithstanding the fact that the rate for the initial carriage was based upon that consideration. This case seems to us indistinguishable in principle from the one now before this Court.

In *Coe vs. Errol*, 116 U. S., 517 (1886), it was held that certain logs which had been cut in New Hampshire and drawn down to a stream in that State and placed therein for the purpose of later being floated down the same stream into the State of Maine were not, while lying in the stream preparatory to the final float, articles of interstate commerce, and were not, therefore, exempt from taxation by the local New Hampshire authorities, for the reason that the interstate trip had not yet been begun.

In the course of the opinion rendered in that case, Mr. Justice Bradley said:

“There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have start-

ed on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state.

“* * * such goods do not cease to be part of the general mass of the property in the state subject as such to its jurisdiction and taxation in the usual way *until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.*” (Italics ours.)

After considering the case of *The Daniel Ball*, 10 Wall., 565, the court continues:

“But this movement does not begin until the articles have been shipped or started for transportation from one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state its destination is not fixed and certain. It may be sold or otherwise disposed of within the state and never put in the course of transportation out of the state. *Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the state for the purpose it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of*

the state its exportation is a matter altogether in fieri and not at all a fixed and certain thing."

Now, it is the contention of the appellant herein that just as carrying property from "the farm or the forest to the depot is only an interior movement," so carrying the property of the coal operators of Ohio from their mines to the Lower Lake Ports on various trains, under a contract providing only for the carriage of the coal to these Lower Lake Ports, when the coal is often not yet sold, when it is not known to what person any car load of coal will ultimately go, or even to what state it will go, and when it is not known whether the coal will be appropriated to existing or future contracts, or whether it will be sold f. o. b. the vessel at the Lower Lake Ports, or f. o. b. the dock at the Upper Lake Ports, and when it is known that the various units of shipment are yet to be mingled at the Lower Lake Ports in the State of Ohio into a cargo of coal on a vessel not yet determined upon, and with whose services the rail carrier has nothing whatever to do, is also a local interior movement of this coal to a common assembling point within the state of Ohio in anticipation of a separate interstate movement as yet not clearly determined upon and existing only in a general way in the mind of the shipper. To use the simple but striking simile of one of the coal operators, the Lower Lake Port is looked upon by the operators as a sort of tub into which flow the small streams of coal coming from the mines and out of which, as the tub approaches fullness dippers full are taken for the purpose of filling vessels which are to transport the coal to the Northwest.

That this coal, prior to the beginning of its final movement by vessel up the lakes would be subject to

taxation in the state of Ohio in the manner suggested in the opinion just quoted from the case of *Coe vs. Errol* is indicated by a decision from the Supreme Court of the State of Ohio.

Carrier vs. Gordon, 21 O. S., 605 (1871).

In the case just cited lumber had been purchased by a non-resident during the winter season and the same was lying upon the river's bank awaiting the opening of navigation for transportation without the state, and this lumber, the Supreme Court held, was taxable in the State of Ohio, notwithstanding the imminence of its movement to another state and the non-residence of its owner.

We anticipate that at this juncture, however, a distinction will be attempted between the two cases last discussed and the present one, because of the fact that the rate fixed by the Railroad Commission of Ohio was for a service which included the unloading of the coal by the rail carrier upon the lake vessel at the Lower Lake port. Let us, therefore, consider whether or not our case is different from what it would be if the rate fixed by the Railroad Commission of Ohio was for the transportation to the Lower Lake Port, exclusive of the unloading service. As is generally known, coal carried by water is usually transferred from the railroad car to the water carrier by means of gigantic unloading machines, which grasp an entire car of coal, elevate the same above the vessel and turn the contents thereof into the vessel. These unloading machines are almost universally constructed and owned by the rail carriers themselves—at least this is true of those along the Lower Lake Ports. In some instances the railroads, after constructing these unloading machines, lease them to

other parties (Rec., p. 87)—sometimes to the coal operators themselves—in which event, of course, the rate charged by the Railroad Company for hauling the coal is for its transportation only. Sometimes the Railroad Companies owning these machines operate them separately, charging the coal shippers a certain number of cents per ton for performing this voluntary service (Rec., p. 87), in which event two separate and distinct charges are made for the service performed by the Railroad Company, one a transportation charge for conveying the coal from the mines to the docks, and another an unloading charge for transferring the coal into the vessel. The method last referred to is the one pursued for instance by The Pennsylvania Company in hauling this very lake cargo coal from this same No. 8 coal field to the same Port of Cleveland, Ohio (Rec., p. 87). In the present case, however, The Wheeling & Lake Erie Railroad and its Receiver, for some years have published a tariff fixing a rate of 90c per ton f. o. b. the vessel for the service performed in both the transportation and the unloading of this lake cargo coal, it being generally understood that of this charge 85c was to take care of the transportation—that being the charge imposed for the same service by the other railroads—and 5c was to pay for the separate and voluntary service performed by the Railroad Company in the way of unloading this coal from the cars into the vessels. Formerly, however, The Wheeling and Lake Erie Railroad also separated the charge for transportation from that of unloading, publishing in the tariff only the transportation charge (Rec., p. 87).

Now, in view of the foregoing facts, as well as in view of the situation in general, we submit that what

ever may be the proper nature of the service rendered by appellee herein in conveying this coal from the mines to the lakes, the nature of that service is not changed by the fact that it at present elects to perform, in addition to the service of transportation, the work of unloading this coal. The Railroad Company, of course, can perform this common service for all of its lake coal shippers at a much less cost than each shipper could perform the same service for himself, and it is, therefore, an economic advantage to all concerned to have the Railroad Company perform this service and make out of it what profit it may. The service, of course, might with equal propriety be performed by a concern independent of both the coal purchasers and the Railroad Company, as elevator and storage services are frequently performed. The point, however, which we wish to make is that the nature of the rail transportation is not and cannot be changed because the carrier chooses, as an incident to that transportation, to perform the unloading service. Nothing, perhaps, illustrates this more forcefully than the facts above referred to, showing that one railroad elects to separate the transportation from the unloading charge, and another elects to make one charge for both services. Surely, it could not, with propriety, be held that in one case the service performed by the carrier constituted an interstate transportation and that in the other it did not. It would seem equally idle to take the position that the appellee herein had been engaged in intrastate service prior to the time when the rate quoted was changed from f. o. b. dock to f. o. b. vessel, but that since that time he had been engaged in performing an interstate service. It ought not to be possible for a carrier to change the

nature or character of a given service *by simply changing the form of its tariff*. The service performed by the rail carrier in unloading this coal is but an incident to that rail transportation, and we submit that the nature of the commerce in which the rail carrier is engaged does not depend and could not properly depend upon whether or not it unloads the coal at all or whether it unloads it into a huge stationary bin or into a lake going vessel.

We submit, therefore, that, when the Circuit Court of Appeals, in concluding that the service affected by the order of the Railroad Commission of Ohio was interstate transportation, relied upon the fact that that rate required the Railroad Company to unload the coal into vessels (Rec., p. 115), such reliance was not justified. The court of original jurisdiction seemed also to be strongly influenced by this fact (Rec., p. 100), and we submit that that court was equally misled to the extent that its conclusion was based upon the performance by the Railroad Company of this separate unloading service.

In *Chicago, etc., Ry. Co. vs. Becker*, 32 Fed. Rep., 849 (C. C. Minnesota, 1887), the question was as to the validity of a certain order of the Warehouse and Railroad Commission of the State of Minnesota governing certain switching charges within the city of Minneapolis. The switching service affected by the order of the Commission was "usually performed in and about the yards and terminal grounds of complainant, but in many cases required such cars to be moved and hauled to considerable distances outside of and beyond such yards and terminal grounds and over the track of complainant and of other Railroad Companies." The Railway Company sought to enjoin the enforcement of the order of the

Commission on the ground that it constituted an unlawful interference with Interstate Commerce and in support of its Bill of Complaint filed affidavits showing that the cars switched by the complainant in the majority of cases were loaded with goods and merchandise destined for points outside the State of Minnesota, and that three-fourths of the traffic affected by the order was interstate commerce.

The court, however, held that the order was proper and lawful and a part of the opinion reads thus (p. 854):

“The underlying question presented is, does the order of the state commission regulate interstate commerce? I find no warrant for the claim advanced that it is an interference with, or regulation of, interstate commerce, and encroaches upon the powers of the federal government. It is true that the loaded cars switched contain freight to be transported to other states, or received from other states, as well as local freight for or from points within the state of Minnesota; but unless the switching service is performed by the complainant, and cars are transferred from a shipper's warehouse or mill to be transported out of the state over a line of railway other than its own, no charge is made. The case presented is this: In order to afford facilities to shippers, the complainant has constructed short lines of road, or side-tracks or switches, so called, from its yard or depot or main lines, running over and across the streets and highways to the various mills and manufacturing establishments in the city of Minneapolis; and its switches are so built as to enable it to take cars from the shippers at the mills, and deliver them to other lines of railway, or deliver cars to consignees received by it from other roads. When this service is performed, and the cars are to be transported from the city of Minneapolis over other roads, and when cars coming into that city over other roads are taken by the com-

plainant over its own switches, and delivered to other roads or to consignees, a charge of one dollar and fifty cents per car is exacted for this switching service rendered, which is claimed to be reasonable and just; * * *. This charge is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment. *The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the state, in the same manner as the carriage by dray per load or distance is established for the public good. And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. The service is local, and there is nothing upon the face of the order of the commissioners indicating that it is intended to regulate interstate commerce. Even if it is conceded that this carrying of freight over the switches is an act of interstate commerce, it does not necessarily follow that the order of the commission affecting this traffic is in violation of the constitution of the United States. It is not every act that affects such commerce that amounts to a regulation of it; and this order fixing the price per car for service rendered, and to which the order applies, is not related to the contract for carrying the freight outside the limits of the state of Minnesota, and is not a part of it.*" (Italics ours.)

This case will be referred to later herein in connection with The Larabee Flour Mills cases.

In *Ex Parte Kochler, Receiver*, 30 Fed. Rep., 867 (C. C. D. Ore., 1887), the Receiver of a line of railroad propounded to the court which had appointed him the question as to whether or not the handling of certain traffic, consisting of goods and merchandise carried by rail from points in the interior of the State of Oregon

to the Port of Portland for further carriage by vessel to San Francisco, California, rendered him amenable to the provisions of the Interstate Commerce Act requiring reports to the Interstate Commerce Commission. The court ruled that the Receiver need not report to the Commission, because of the fact that there was no common arrangement between the rail and water carrier for a continuous movement from one state to another, but went on by way of dictum to say that both the railroad and the steamers were engaged in interstate commerce. The decision of the court in this case is undoubtedly correct, but the dictum is contrary to the contention of appellant herein, and will be referred to hereinafter.

In *Missouri, etc., Co. vs. Cape Girardeau, etc., R. R. Co.*, 1 I. C. C. Rep., 30 (1887), the complainant in order to show that the shipment of certain railroad ties was interstate commerce relied on the fact that after the ties had arrived at the destination to which they had been sent by the railroad, it intended to send them across the river into another state by boat. The Commission, however, ruled as follows, as shown by the head note of the case:

“The fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same state intends to have it further transported by a second carrier into another state, does not make such first transportation interstate commerce or render the carrier subject to the control of the commission in respect to it, *even though such first carrier may be informed of the ultimate destination of the merchandise.*” (Italics ours.)

In *New Jersey Fruit Exchange vs. Central R. R. of New Jersey*, 2 I. C. C. Rep., 142 (1888), peaches were shipped in cars from various points in the State of New

Jersey to Jersey City in the same state, and there delivered to the consignee, who took the same immediately to the City of New York for sale and distribution. The shipments from the various points in the State of New Jersey to Jersey City were held not to constitute interstate commerce, and, therefore, not within the jurisdiction of the Interstate Commerce Commission, though the commodity shipped was at all times intended for ultimate delivery and use in New York.

In *Cutting vs. Florida Ry., etc., Co.*, 46 Fed. Rep., 641 (C. C. N. D. Fla., 1891), certain orange growers in the State of Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agents at the latter point for re-shipment, and these agents immediately forwarded the fruit to its destination in another state. In this case the court held that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission. This early case is opposed to the contention of the appellant in this case, but for some years this decision has not been regarded as representing the law, because of contrary decisions by this Court.

1 *Drinker, Interstate Commerce Act*, p. 84.

In *Ft. Worth, etc., Ry. Co. vs. Whitehead*, 26 S. W. Rep., 172 (Tex. Civil Appeals, 1894), there was a suit to recover an overcharge on the shipment of cars of coal from Fort Worth to Decatur, both within the State of Texas. The defense was that the shipment was an interstate one and that, therefore, the carrier was not amenable to state regulations. The coal had in fact been shipped from Lehigh, Okla., under a bill of lading to Ft. Worth, Texas, *which bill of lading stated that the coal*

was for Decatur, but it did not appear that any common arrangement existed between the carriers which connected at Ft. Worth. Under these circumstances the court held that the shipment from Ft. Worth to Decatur was intrastate, and that, therefore, the state rates applied.

In *Houston Direct Navigation Company vs. Insurance Co. of North America*, 30 L. R. A., 713 (Tex. Supreme Court, 1895), certain cotton was shipped from Houston, Texas, to Galveston, Texas, on a bill of lading to Galveston only, though the ultimate destination of the cotton was New York City, and in certain litigation growing out of the destruction of the cotton by fire, the court held that the first part of the journey from Houston to Galveston constituted interstate commerce, and that, therefore, the Statutes of the State of Texas forbidding carriers to limit liability did not apply. This is another early case in which the decision is opposed to the position of appellant herein, but in view of the later decisions of the Supreme Court of Texas, which will be referred to hereinafter, this early case cannot be regarded as representing the law of that state.

In *Cincinnati, etc., R. R. Co. vs. Interstate Commerce Commission*, 162 U. S., 184 (1896), the question of the jurisdiction of the Interstate Commerce Commission under the long and short haul clause of the Interstate Commerce Act was involved in the case of a haul partly on the line of an intrastate road. This court held that the Commission had jurisdiction, because of the common arrangement of the interstate and intrastate carrier, as evidenced by the through bill of lading with divisional rates, but on page 192 of the report this court said:

“It may be true that the ‘Georgia Railroad

Company' as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another state. *It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia.* But when the Georgia Railroad Company enters into a carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce."

In *Minneapolis, etc., R. R. Co. vs. State of Minn.*, 186 U. S., 257 (1902), no question was made as to the jurisdiction of the State Railroad Commission or as to whether or not the commodity in question was interstate commerce, but the action of the State Railroad Commission in fixing the rates on hard and soft coal in car load lots shipped from Duluth to various points in the interior of the state was upheld. This coal in question had come from Pennsylvania by water on the Great Lakes to Duluth, and from there was being distributed throughout the State. The case is, therefore, the converse of the present one and involves exactly the same point as to jurisdiction as does the present one, and since this de-

cision affirms the decision in the State court (80 Minn., 191), it seems reasonable to infer that both of those courts were under the impression that the State Railroad Commission had jurisdiction in the premises.

In this same connection it seems proper to call attention to the fact that the Wisconsin Railroad Commission has lowered rates on lake coal shipped by rail from the City of Superior to points in the State of Wisconsin.

Noble vs. Chicago, St. P., etc., Ry. Co., 1 Wis. R. Com. Rep., 767 (1907).

Elbertson vs. Chicago & St. P., etc., Co., 2 Wis. R. Com. Rep., 593 (1908).

The case of *J. Rosenbaum Grain Co. vs. Chicago, etc., Ry. Co.*, 130 Fed. Rep., 46 (C. C. N. D. Tex., 1903), is sometimes cited as holding that a State Railroad Commission has no power to regulate so-called "proportional tariffs" on shipments between points in the same state which are to be re-shipped for export. An examination of the facts in this case, however, shows that the shipments in question originated "without the State of Texas" (p. 49), and that, therefore, the State Railroad Commission was clearly without jurisdiction. The language used in the opinion is undoubtedly sound as applied to the existing facts.

In *Diamond Match Co. vs. Village of Ontonagon*, 183 U. S., 82 (1903), we have a case very similar to that of *Coe vs. Errol*, discussed earlier herein, except that the Diamond Match case goes a little farther in holding that logs which have not only been cut but have been floated down a stream and its tributaries to a boom or sorting gap from which they are to be shipped by rail as needed to a point outside the state, are not, while awaiting de-

livery to the Railroad Company for such shipment the subject of interstate commerce, but on the contrary are proper subjects for state taxation.

In *People of New York vs. Knight*, 192 U. S., 21 (1904), a franchise tax imposed by the State of New York upon The Pennsylvania Railroad Company for carrying on a cab service wholly within the state for the purpose of conveying its passengers to and from its ferry landing in New York City, the charges for which were entirely separate from those exacted for railroad transportation, was held not to be an unconstitutional burden on interstate commerce, but a tax upon an independent local service preliminary or subsequent to any interstate transportation.

We quote the following from the opinion in that case (p. 25):

“The contention of the Company is that this cab service is merely an extension, and therefore a part of, its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their houses instead of from the ferry landing. * * * that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company * * *.

“It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is

simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. The state may not tax for the privilege of doing an interstate commerce business. On the other hand, *the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.*

" * * Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation * * *."*

"As we have seen, the cab service is rendered wholly within the state, and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside, the state; and unless the interstate character is established, locality determines the question of jurisdiction." (Italics ours.)

In *United States vs. Geddes*, 131 Fed. Rep., 452 (C. C. A., 6th Circuit, 1904), the question was whether or not the Ohio River and Western Railway Company, a railroad whose termini were all within the State of Ohio, had violated the Safety Appliance Act, which then applied to "any common carrier engaged in interstate commerce," which "hauls or permits to be hauled or used on its line any car used in making interstate traffic," because of the fact that the Railway Company had hauled in a car from Summerfield, Ohio, to Bellaire, Ohio, 37 cases of eggs, destined for Pittsburg, Pa., and deliv

ered them at Bellaire to the Baltimore & Ohio road for shipment. The Circuit Court of Appeals for the 6th Circuit held that the Safety Appliance Act did not apply, since the carrier was not engaged in interstate commerce, because its contract of carriage was between points exclusively within the State of Ohio, and it had no arrangement with any other carrier for carriage to any point or points beyond the limits of the State of Ohio. The court, after considering various decisions, together with the Interstate Commerce Act and the Safety Appliance Act, makes use of the following language on page 456:

"In the present case there was no through bill of lading, no through charge, no conventional division thereof among the carriers, and no arrangement for a continuous carriage or shipment, unless the method of transfer by which the receiving road assumed the payment of the charges of the delivering road constituted such an arrangement. If it did, then the only way a local road can escape participation in an arrangement for a continuous carriage or shipment of freight from one state to another is to refuse altogether to handle such freight; and it cannot do this, for, as common carrier, it is bound to receive and transport from one point to another on its line, freight offered it for transportation, regardless of the origin or destination of the freight * * *.

"The defendant company did all it could to keep its business local. It limited its interest, so far as it could, to the transportation of the freight over its own line. It made no arrangement with the Baltimore & Ohio for through carriage either way. It was interested in none. It shared in none. It was interested only in its own local charge, and whatever arrangement it made was with a view simply of securing this. *The fact that certain goods transported by it were marked for other states or re*

ceived from other states did not make it a party to any arrangement for their interstate transportation in either direction. The part it performed was purely local. The interstate portion of the transportation was performed by the Baltimore & Ohio. When it delivered the goods to that road, they were still in Ohio. They might have stopped there for aught it cared. It had made no arrangement for their transportation any further. And so with the goods it received from the Baltimore & Ohio. They were offered to it in Ohio, and it was a matter of indifference to it where they came from. It had been no party to their transportation into Ohio. It received them virtually as Ohio goods, and carried them from one point to another in the state.

"Taking the view that *the defendant road*, at the time of the acts complained of, *was not engaged in interstate commerce*, and that the cars which hauled the cases of eggs from Summerfield to Bellaire, and the coils of rope from Bellaire to Woodsfield, were not engaged in 'moving interstate traffic,' we affirm the judgment of the lower court." (Italics ours.)

The case just cited and quoted from is from the same Circuit Court of Appeals which decided the present case adversely to appellant, but we submit that both of these decisions cannot be correct. Later in this discussion we shall refer to the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case now under consideration.

In *White vs. St. Louis, etc., Ry. Co.*, 86 S. W. Rep., 962 (Tex. Civ. App., 1905), it appears that a passenger was transported from Chicago to a point in Texas on three separate railroads, with separate transportation for each road. In some manner not shown by the record the passenger's baggage was checked through. The last carriage was exclusively within the State of Texas, on

which carriage the passenger's baggage was damaged. It was held that the last road was engaged in intrastate commerce in transporting the passenger and baggage, and that, therefore, the state statute forbidding the limitation by a carrier of its liability, applied.

In *United States vs. Colorado, etc., R. R. Co.*, 157 Fed. Rep., 321 (C. C. A., 8th Circ., 1907), we have a case directly opposed to the Geddes case, just cited as having been decided by the Circuit Court of Appeals for the Sixth Circuit. One or the other of these cases must, therefore, be wrong.

In *Larabee Flour Mills Company vs. Missouri, Pacific Railway Company*, 74 Kansas, 808 (1906), The Larabee Flour Mills Co. applied to the Supreme Court of Kansas for a writ of mandamus to compel the Missouri Pacific Railway Company to resume certain transfer or switching service between the mill of the plaintiff and the line of another railroad, to-wit, The Atchison, Topeka & Santa Fe. This service required the Missouri Pacific to take empty cars to the mill and bring loaded cars away from the mill over a transfer track connecting The Atchison, Topeka & Santa Fe with the Missouri Pacific, over about one mile of the main line of the Missouri Pacific and over a spur track extending from the main line of the Missouri Pacific to the mill. It appeared further that a large part of the flour contained in the loaded cars which were sent out by the mill was destined for points outside of the state of Kansas. The railroad defended the application for the Writ of Mandamus on the ground that the granting of such a Writ would result in an unlawful interference with interstate commerce. The Supreme Court of Kansas, however, after considering and quoting at length from the cases of *Coe vs. Er-*

rol and Chicago, etc., Railway Company vs. Becker, hereinbefore discussed, concluded that the switching or transfer service in question was an intrastate service and, therefore, allowed the Writ as prayed for.

On page 818 of the Report, the opinion reads as follows:

"After a car has been loaded and returned to the transfer track the Sante Fe may for lawful reasons decline to receive it. If it does receive it *there is neither a consignee nor a destination for it until the mill company has given shipping directions.* The preliminary stage has still not been passed. The movement from the point of origin necessary to interstate commerce not only has not begun, but may never begin. As remarked by Mr. Justice Bradley in the case of *Coe vs. Errol*, 'though intended for exportation, they may never be exported; the owner has a perfect right to change his mind,' the custody of the carrier is not impressed with the change which frees the goods from domestic control until after they have been finally released to it by the consignor for transportation to a destination fixed beyond the state line; and under the custom prevailing at Stafford this does not occur until the cars have been taken to the transfer track, received by the Sante Fe, and finally billed.

"There is still another test which may be applied. The Missouri Pacific engine, for all practical and legal purposes, simply takes the place of the plaintiff's teams in moving flour from the mill to the Sante Fe. Its work is that of switching cars. The service is purely local. It is independently contracted for. It has no relation to the contract of carriage by virtue of which the freight is removed beyond the borders of the State. It has no relation to the ultimate destination of the cars handled. *It begins and ends before the destination of any car is fixed and is in fact nothing but a preliminary incident to the interstate journey.* This being true it is

subject to state control. *Pennsylvania Railroad Company vs. Knight*, 192 U. S., 21." (Italics ours.)

This case was taken to the Supreme Court of the United States on Writ of Error, and is found in the reports of that court as

Missouri Pacific Railway Company vs. Larabee Flour Mills Company, 211 U. S., 612 (1909), and this honorable Court affirmed the judgment of the Supreme Court of Kansas. The majority opinion in this case was written by Mr. Justice Brewer, and it is therein said that the "case does not rest upon any distinction between interstate commerce and that wholly within the state," the majority of the court apparently taking the position that even assuming that the cars in question were in interstate commerce the State of Kansas nevertheless had the right to regulate the service affected by the writ of mandamus. Mr. Justice Holmes concurred in the majority opinion on the ground that the cars had not yet been appropriated to interstate commerce. Mr. Justice Moody wrote a dissenting opinion, in which he stated his inability to agree with the reasoning of the majority so far as it declared that it was proper for the State to regulate the transfer of the cars after the same had been appropriated to interstate commerce, but went on to say that it was quite possible to support the case upon the ground that the cars had not yet become subjects of interstate commerce, and if the decision had been put on that ground he should not dissent. Mr. Justice White concurred in the dissenting opinion of Mr. Justice Moody.

Considering now what may be inferred to briefly as the "switching cases," namely *The Chicago, etc., Railway Company vs. Becker*, hereinbefore cited, and *The*

Larabee Mills case in the State court of Kansas and in this Honorable Court, we suggest that it would be quite justifiable to uphold the order of the State Railroad Commission of Ohio in the present case on either of the two grounds upon which the state regulations were upheld in the switching cases, namely, either upon the ground that the movement of the cargo coal from the mines to the Lower Lake ports is an independent preliminary movement, not sufficient to impress the traffic with the character of interstate commerce, or upon the other ground that even assuming that the coal is an article of interstate commerce after it leaves the mines, the transportation to the Lower Lake Ports is local, and, therefore, a proper subject of regulation by the state authority.

In this connection had best be considered another case decided by the Supreme Court of Indiana in the same year the *Larabee* case was decided by this Honorable Court. It is not called a switching case, but extends the doctrine of the switching cases to the independent local haul of a particular commodity destined to another state.

In *Chicago, etc., Ry. Co. vs. Railroad Commission of Indiana*, 87 N. E. Rep., 1030, it appeared that several railroads intersected at Lafayette, Indiana, and that one L. owned a gravel quarry some miles distant from Lafayette, and that one of the intersecting railroads had a short line running out to the quarry and made a rate for taking the empty cars from the various intersecting lines out to the quarry and bringing loaded cars back from the quarry for shipment on these various lines to points without the state of Indiana. The Railroad Commission of Indiana found the rate imposed by the defendant rail

road company for this service excessive and ordered it reduced, from which order there was an appeal on the ground, among others, that the order constituted an unlawful interference with interstate commerce. The order of the Railroad Commission was upheld, however, the court holding that the service in question did not constitute interstate commerce.

The court, in addition to stating that the movement in question was a preliminary one, just as much so as if the gravel had been drawn by horses and wagons, also relied in particular upon the fact that no through bill of lading was issued by the defendant railroad, and that it was not liable for or concerned in the movement on the other railroads. The court on this last point cited and relied upon the then recent case of *Gulf, Colorado, etc., Railroad Co. vs. Texas*, 204 U. S., 403, to which we shall next refer.

In *Gulf, etc., Ry. Co. vs. State of Texas*, 204 U. S., 403 (1907), we have a comparatively recent decision of this Court. The facts in the case are somewhat involved, but in the main are as follows:

The Harroun Company, doing business in Kansas City, Mo., had contracted with parties in Hudson, So. Dak., for the purchase of two cars of corn, to be delivered at Texarkana, Tex., the shipper paying the freight. Later, the Hardin Company of Kansas City, Mo., contracted with Saylor & Burnett to sell the latter at Goldthwaite, Texas, two cars of corn. In order to fulfill the contract with Saylor & Burnett the Hardin Company purchased from the Harroun Company the corn which it already had *en route* from South Dakota to Texarkana. The *reason why* the Hardin Company purchased corn to be delivered at Texarkana was because

they could fulfill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bushel *cheaper than they could if they had had the corn shipped direct to Goldthwaite, and at the time the Hardin Company purchased the corn they intended that it should go to Saylor & Burnett and should be shipped to Goldthwaite from Texarkana*, and that Company furnished the agent of the Harroun Company, in Texarkana, with blank bills of lading for forwarding the corn from Texarkana to Goldthwaite. These bills of lading were duly made out and the corn shipped from Texarkana to Goldthwaite, but on its arrival there the carrier demanded a sum in excess of the rate prescribed for that carriage by the State Railroad Commission. Suit was instituted against the defendant, who was the last of the connecting carriers, to recover the statutory penalty for extortion. The defense was that the last carriage was interstate and that therefore the regulations of the State Railroad Commission had no application. Mr. Justice Brewer, in the opening sentence of the opinion of the court, said:

“The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment.”

The Court, affirming the decision of the highest court of Texas (97 Tex., 274), held that this shipment was an intrastate shipment, and that therefore the rate established by the State Railroad Commission applied.

The headnote of this case reads as follows:

“The intention or purpose of the owners of an interstate shipment of a carload of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such two points, when performed by

a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one, and, as such, exempt from the regulations of the state railroad commission."

And on page 412 of the report, the language of the opinion reads thus:

"The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the *transportation* is another thing, and *follows the contract of shipment*, until that is changed by the agreement of owner and carrier * * *. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner * * *. *Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.*

"In this respect there is no difference between an interstate passenger, and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.

"The question may be looked at from another point of view. *Supposing a carload of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation,*

and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the state? To state the question in other words—if the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to some place outside the state?" (Italics ours.)

Few cases decided by this Court in recent years have been referred to more frequently in the same period of time than has the one just cited and quoted from. So commonly has it been referred to and discussed that it has acquired the brief sobriquet of "The Texarkana case," and whatever contrariety of opinion may have existed prior to the rendition of the decision in that case, the decision therein has been regarded, at least until quite recently, as establishing the doctrine, as phrased in the opinion rendered by Mr. Justice Brewer, that "*transportation * * * follows the contract of shipment * * **" so far as all transportation regulations are concerned; that the agreement for transportation between two points within the same state is local transportation, subject to state regulation, regardless of any subsequent or ultimate destination the commodity transported may have, and regardless of any other extraneous fact or condition disclosed or undisclosed pertaining to the shipment in question.

State courts and commissions and the Interstate Commerce Commission have interpreted this decision as

establishing the doctrine just stated, and after express reference to this decision and quotation from the opinion therein have followed it, in some instances changing former rulings, and the initial complaint herein which gave rise to the order whose validity is now in question was instituted before the Railroad Commission of Ohio in reliance upon the decision and opinion of this Court in the *Texarkana* case.

Some of the decisions of the courts and of the Interstate Commerce Commission which have followed and relied upon the ruling in the *Texarkana* case and have interpreted that case as above indicated will now be referred to.

In *Hope Cotton Oil Company vs. Texas Pacific Railway Company*, 12 I. C. C. Rep., 266 (1907), a former ruling of the Commission which had been questioned by the United States Circuit Court prior to the decision in the *Texarkana* case was reaffirmed on the basis of the decision of this Court in that case. The ruling made by the Interstate Commerce Commission was that a carrier had no right to refuse cotton seed at regular rates from Shreveport, Louisiana, to Texarkana, Arkansas, though the carrier knew that the shipper intended to get delivery at the latter point for the purpose of re-shipping at the local rate from there to Hope in order to get a better rate by combining the local rates than by taking the through rates.

In *Laning-Harris Coal, etc., Company vs. Missouri Pacific Railway Company*, 13 I. C. C. Rep., 154 (1908), a car of coal was shipped by a mining company from Springfield, Illinois, to Kansas City, Missouri, and thence forwarded to Salina, Kansas, the sum of the two local rates amounting to \$3.50, while the through rate

was \$3.73. The carrier charged the shipper the latter rate. Held, that the mining company should have reparation, as the two shipments were local and the shipper was entitled to the benefit of the local rates, in view of the decision of the United States Supreme Court in the Texarkana case.

In *Kansas City, etc., Railway Company vs. Brooks*, 105 S. W. Rep., 93 (Ark., 1908), one Armstrong boarded a train at a point in the State of Arkansas, intending to go to a point in the State of Texas, and offered to pay his fare to a point in Arkansas near the Texas line and there to get a ticket to the point in Texas to which he wished to go ultimately, it appearing that the train stopped long enough at the intermediate point in Arkansas to enable Armstrong to get a ticket to his destination. In a suit to recover the state statutory penalty for the carrier's failure to accept his offer, the court held that Armstrong had a right to make such an offer for an intrastate carriage at intrastate rates for the first part of his journey. The opinion in this case also cites and expressly follows the Texarkana case and commenting upon the conduct of Armstrong in electing to make two separate and distinct parts of his journey, says on page 94:

“He had the right to break the continuity of his journey if he so desired.”

In connection with the case from Arkansas just stated, it should be observed that this case in following the Texarkana case overruled by necessary implication a former decision of the same court, to-wit, *Porter vs. St. Louis & Southeastern Railway Co.*, 95 S. W. Rep., 453 (Ark., 1906), in which last named case a shipper bought a car load of lime at Erin, Tennessee, which he wished

to transport to Stuttgart, Arkansas. He shipped it to Brinkley, Ark., and there reshipped it to Stuttgart, in order to take advantage of the local rates. It was held in that case that the last movement from Brinkley to Stuttgart was an interstate shipment upon which the shipper must pay the interstate rate. This earlier decision is, of course, diametrically opposed to the Brooks case, decided two years later and just stated, which latter case is precisely in point with the one now at bar, except that it involves the case of a passenger, while the present one involves the shipment of freight.

The case of *Augusta Brokerage Company vs. Central of Georgia Railway Company*, 62 So. Rep., 996 (Ga. 1908), involves a question of discrimination and the point was made that the discrimination complained of was not in reference to an intrastate shipment, since the complainant wanted the delivery made at his warehouse simply for the purpose of at once re-shipping the commodity to a point without the state. It was held, however, that the shipment in question was intrastate, since the *immediate destination* was within the state, the court saying:

“The plaintiffs were avowedly buyers of cotton seed for South Carolina parties. It is admitted that the cotton seed they bought was intended ultimately to be shipped to South Carolina, and, presumably, their request that the car be placed at the side track at this warehouse was intended in some way to facilitate shipment to its ultimate destination in South Carolina. *But the intention of the consignee as to the future disposal of his property, by shipment over another line, under a new bill of lading, into another state, cannot change an intrastate shipment into an interstate shipment. The law is not dealing with the intention of the consign*

or, but solely with the relation of the railroad to the freight transported. A seller in Georgia might conduct with a buyer in South Carolina an interstate business as between themselves, but if the railroad refuses to carry beyond its own line and compels unloading at its terminus in Georgia, such business in its relation with the railroad is wholly intra state." (Italics ours.)

In *Kurtz vs. Pennsylvania Company*, 16 I. C. C. Rep., 410, it was contended by the defendant that inasmuch as the sum of the local rates from New Castle to Pittsburgh and from Pittsburgh to New York were less than the through rate from New Castle to New York it would be illegal for the defendant to permit the complainant to effect his through transportation by means of two local tickets.

In commenting upon this contention, the Commission says:

"If, they say, the complainant knowing that he is to make a through journey from New Castle (Pennsylvania), to New York, purchases a local ticket for \$1.00 to Pittsburgh and a local ticket from Pittsburgh for \$10.50, for the purpose of thereby securing through transportation at \$11.50, which is less than the published through rate, he is guilty of a violation of the Act to Regulate Commerce; and the defendants, if they knowingly permit this practice are equally guilty."

After referring at some length to a previous ruling of the Commission in which had been considered the right of a passenger intending to go from Charleston to Savannah, for which the through rate was \$6.00 to purchase a ticket from Charleston to the state line for \$3.00 and from the state line to Savannah for \$2.00, the opinion continues as follows, on page 413:

"Upon the other hand, this Commission has

stated in its administrative ruling, and now repeats, that a passenger may properly pay his fare from Charleston to the state line and again from the state line to Savannah, *although he thereby obtains through transportation between these points for less than the published through rate, and although he does so, knowing that he is to go from Charleston to Savannah and deliberately seeking this means of obtaining transportation at less than the through rate.*

"The reason for this is that not the intent of the parties, but the actual transaction must be regarded, as was held by the United States Supreme Court in Gulf, Colorado & Santa Fe Railroad Company vs. Texas, 204 U. S., 403." (Italics ours.)

In *Dobbs vs. Louisville, etc., Railroad Company*, 18 I. C. C. Rep., 210, the complainant shipped three car loads of canned peaches from Oakhurst, Georgia, to Marietta, Georgia, and from thence re-billed one car to Lexington, Kentucky, and two cars to Cincinnati, Ohio. The through rates from Oakhurst to Lexington were 58c per one hundred pounds, and 60c to Cincinnati. A commodity rate of 27c from Marietta to Lexington and Cincinnati was in effect. A local rate of 6c was in effect from Oakhurst to Marietta, thus making the combination rate 33c. The complainant, however, was compelled by the carrier to pay the full through rate on the cars in question and sought reparation on the basis of the rate from Marietta, claiming that the through rate from Oakhurst was unreasonable. The defendant railroad, however, contended that the movement from Oakhurst to Marietta was intrastate, and the rate from Marietta to destination was conceded to be reasonable. The Commission in sustaining the position of the railroad defendant, uses the following language:

"Complainant did not attempt to make a

through interstate shipment when tendering this freight to the carrier, and it expressly absolves the agents of the carrier from conniving for the purpose of defeating the through rate on canned goods. He states in this connection, 'the rates were given me, and the one from Oakhurst was so unreasonable that I took the best combination that I could make from them.' *By taking the course he did, complainant voluntarily adopted a movement and a rate applicable thereon which were intrastate in character. Gulf, Colorado & Santa Fe vs. Texas, 204 U. S., 403. Moreover, separate contracts were made for the two movements; charges for the first movement were paid at Marietta and did not follow the shipments to destinations.*

Under the facts of record we find that the Commission is without jurisdiction of the movement from Oakhurst to Marietta, to which was applied and collected the separately established state rate, and as there is no allegation of unreasonableness as to the separately established interstate commodity rate from Marietta to destinations, the complaint will be dismissed, and it will be so ordered." (Italics ours.)

In *Texas & New Orleans Railroad Company vs. Sabine Tram Company*, 121 S. W. Rep., 256 (Tex. Civ. App. 1909), there was a suit by the Sabine Tram Company against the Railroad Company for the recovery of excessive freight charges and for the enforcement of the state statutory penalty for extortion.

The facts involved in the case were substantially as follows:

The Sabine Tram Company was a manufacturer of lumber in Texas. The Powell Company was engaged in buying lumber for export. Powell contracted with The Sabine Tram Company for certain car loads of lumber at a certain price f. o. b. cars at Sabine. The Sabine

Tram Company shipped the lumber, making out the bill of lading to the consignor, notify Powell. The way bills for the same were marked "for export," were endorsed by The Sabine Tram Company, who was the consignor, and sent to Powell.

On the arrival of the lumber at Sabine the agent of Powell directed the cars to be at once put on the dock about a quarter of a mile from the station, where the lumber was unloaded into the water by the ship's side. The carrier knew when the freight was collected that the lumber was to be shipped abroad. Ships were often chartered before the lumber left the mill and often waited at Sabine until the lumber should arrive, and the contracts of sale in Europe were often made before the lumber began to leave the mill and even before it had been purchased by Powell. The lumber would lie at Sabine until a ship should arrive to take it.

Powell, the purchaser for export, took out insurance on the lumber before the same arrived, so as to be in force from the time of arrival until the lumber should be carried safely to its final destination in Europe. Powell knew that all the lumber purchased was to go abroad, but did not know just where any car would go until its arrival in Sabine, and its inspection and classification there. The Sabine Tram Company supposed, from its general knowledge and from its understanding of the nature of the business which Powell conducted, that the lumber which it shipped was to go abroad, but it gave this matter no concern. The Sabine Tram Company paid the freight on the lumber shipped to Sabine. The principal defense to the suit was that the shipment in question was an interstate one.

The court held that this case was governed by the

Texarkana case, and that it was, therefore, not necessary to consider various conflicting earlier decisions of the courts of the state of Texas, and, consequently, ruled that the shipment in question was an intrastate one and that The Sabine Tram Company was entitled to a judgment. The opinion in this case is quite lengthy and quotes extensively from the opinion of the United States Supreme Court in the Texarkana case and applies the same step by step to the facts in the Sabine Tram case. The court interpreted the Texarkana case as deciding that the contract of carriage was alone to be looked to in determining the nature of the shipment, and said that the interstate shipment was not begun until the carriage to Sabine was ended, and that, therefore, the decision which was then rendered was in perfect accord with the decision in the case of *Coe vs. Erroll*. The court concludes its opinion on page 62 by stating that it is "utterly unreasonable" that the intention of the consignee should determine the character of the shipment and that if "allowing the terms of a shipping contract" to determine the nature of the shipment will place it in the power of an owner to control the matter, it can see no harm in this, nor any violation of the spirit or purpose of the Commerce Clause of the Federal Constitution.

The facts in this Sabine Tram Case bear a striking resemblance to those in the present case, not only as to the manner in which the lumber and coal are bought, sold and transported, but also in that the lumber is marked "for export" in the way bills in The Sabine Tram Case, just as the coal is marked "lake" in our case. We submit that the two cases are indistinguishable in principle.

It may be remarked in this connection that there are certain earlier decisions of the courts of Texas which

are, at least in spirit, contrary to the decision in the case just discussed, one of which has been referred to earlier herein, but in view of the decision just discussed, and in view of certain later ones next to be referred to, one of which is by the Supreme Court of the State of Texas, and all of which have been rendered since the decision in the Texarkana case and expressly refer to that case, it does not seem advisable or necessary to discuss or refer to the earlier cases.

The additional later cases just indicated are:

Texarkana, etc., Ry. Co. vs. Sabine Tram Co., 129 S. W. Rep., 198 (Tex. Civ. App. 1910).

Wood, etc., Co. vs. Galveston, etc., Co., 130 S. W. Rep., 857 (Tex. Civ. App. 1910).

Texas & Pacific Ry. Co. vs. Taylor, 126 S. W. Rep., 1117 (Tex. Supreme Court, 1910).

In the case last cited it was held that a state statute imposing a penalty for a refusal to furnish cars applied to a case in which a shipper intended to ship stock from one point to another in the State of Texas and then to ship the same to Mexico. The court held as follows, on page 1119 of the Report:

"Taylor ordered cars in which to ship his stock to El Paso. The bill of lading bound The Texas & Pacific Railroad Company to carry the stock to El Paso and there deliver them to Taylor. The stock was carried to El Paso and there delivered to Taylor and by him shipped by another railroad to Mexico. *When the plaintiff in error delivered the stock to Taylor in El Paso the contract had been fully complied with and its liability terminated. This was purely and simply an intrastate shipment.*" (Italics ours.)

In *Wells-Higman Company vs. Grand Rapids, etc., Ry. Co.*, Interstate Commerce Commission, No. 2270, decided November 7, 1910, a shipper sought to recover an

overcharge on a car load shipment of baskets which had been made first from Metropolis, Illinois, to Chicago and thence to Lawton, Michigan. The Interstate Commerce Commission refused reparation, stating as follows:

"The contract entered into with the Illinois Central for the intrastate transportation to Chicago, care of Pere Marquette at Riverdale, was duly discharged before the Interstate movement to Lawton commenced. *Gulf, Colorado & Santa Fe Ry. Co. vs. Texas*, 204 U. S., 403."

After citing and quoting from the case of *Coe vs. Errol*, the opinion continues:

"Two separate and distinct movements, therefore, comprise this transportation from Metropolis to Lawton—an intrastate movement from Metropolis to Chicago and an interstate movement from Chicago to Lawton. Over the intrastate movement we have no jurisdiction."

In *Oregon Railroad & Navigation Co. vs. Campbell*, 180 Fed. Rep., 253 (C. C. Ore. 1910), certain barrels of sugar had been purchased in the state of California by Lang & Company of Portland, Oregon. This sugar was shipped and billed to Lang & Company and transported to Portland, Oregon, by a steamship not under common control or management with the railroad. At the time the sugar was bought and ordered sent to Portland by Lang & Company, that company intended to ship the sugar in question from Portland to other points within the State of Oregon. Upon the arrival of the sugar at Portland, Lang & Company took possession of the same and placed it in the warehouse, without removing the sugar from the original packages in which it had been transported from California to Oregon. Later this sugar was sold and shipped over the line of The Oregon

Railroad & Navigation Company to a party in Baker City, Oregon. Suit was brought against the Railroad Company for freight charges which it had exacted in excess of those established by the State Railroad Commission, and the defense was made that since Lang & Company had from the very beginning intended to send this sugar to some points within the state of Oregon other than Portland, and since the sugar at the time of the shipment from Portland to Baker City still remained in the original packages in which it had come from California, the Railroad Commission of the State of Oregon was without jurisdiction over the transportation in question.

The court, however, in reliance upon the Texarkana case held that the shipment in question was an intrastate one, and therefore, subject to the jurisdiction of the State Railroad Commission.

In discussing the contention that since under the doctrine of the so-called "original package" cases, the sugar in question must necessarily be regarded as an article of interstate commerce, the court uses the language to which we desire to direct attention when it says:

"* * * it must be that a different principle applies to the carrier of freight than that which appertains to the importer of goods. An importer may insist that he has a right to sell goods that he has brought into a state from another state, while in the original packages, but it would not follow that a carrier has the right to treat those goods as interstate commerce so long as they remain in that condition unsold by the importer. *The carrier depends rather upon his contract of carriage and interstate traffic as to him depends upon whether he is called upon to transport from one state to another or to serve his patrons by transportation wholly within the limits of a state.*"

After quoting from the Texarkana case the opinion of the court continues as follows, as will be found on page 256 of the Report:

“The case turns upon the contract of shipment between the shipper and carrier and when that is at an end the shipper can claim nothing further as respects the property carried. It is then at the command of the owner and if he chooses to ship it again from one point to another in the state it becomes an intrastate shipment notwithstanding the owner may be dealing with an article of interstate commerce. For illustration, take the case of *Leisy vs. Hardin, supra*; where beer was shipped into Iowa in original packages, the owner could not be deprived of the right to sell the beer while it remained in original packages, because it was an article of interstate commerce. The shipment of the beer to him from another state was an interstate shipment. When that shipment was at an end another carrier who might transport the beer to another point in the state of Iowa, could not claim that the shipment was interstate, because the article might be characterized interstate commerce in the hands of the owner. There must be and is a distinction between interstate commerce as it pertains to the article and interstate commerce as it pertains to transportation and carriage. The former depends upon the fact that it is an article of commerce—that is of barter and sale—between the states or with foreign countries, and the latter upon the fact that it is being transported from one state to another. When the transportation ceases or comes to an end the shipment has lost its character as an interstate shipment and if the commodity is again moved it becomes an intrastate or interstate shipment according as it is moved to a point wholly within the state or a point without.

“I am constrained to the view that the case of *Gulf, Colorado & Santa Fe Railway Company vs.*

Texas, supra, is controlling in this, and I, therefore, hold that the Intervener is entitled to the rebate demanded in each of the three shipments specified. Let the decree be entered accordingly." (Italics ours.)

The italicized portion of the opinion just quoted refers to a matter to which we would direct the consideration of this Court, namely, that there may well be a distinction between an article of interstate commerce and an article in interstate transit, and that an article of interstate commerce when being transported from a point in a state to another point in the same state under an independent arrangement between the owner and the carrier may properly be regarded as in intrastate transportation, and its transportation, therefore, properly regulated by a state supervising body. Expressed otherwise the thought is that when commodities are conveyed by rail between two points in the same state under a contract of carriage for that transportation, the proper body to regulate that charge, at least in the absence of any action with respect to such matters by the Federal Congress, is the State regulating body. Such a method of regulation at once suggests itself as a simple and logical method of regulation and avoids the necessity of determining in every case, upon evidence often uncertain and sometimes concealed, whether or not a shipment tendered consists of articles of inter or intrastate commerce, for as suggested by the opinion last quoted from, if a state regulating body cannot fix the rate upon any article of interstate commerce, the importer of a box of furs from abroad or of a case of beer from another state, so long as the same are unsold or unbroken, can claim exemption from any rates estab-

lished by a state, notwithstanding how frequently he may desire to transport the same between points in the same state, and the result would be the necessity for having on file with the Interstate Commerce Commission schedules of innumerable rates between innumerable points in the same state based upon innumerable contingencies. It has been the general understanding that to avoid this uncertain and chaotic state of affairs this court in the *Texarkana* case laid down the doctrine that so far as the regulation of the movement of traffic was concerned transportation should follow the contract of shipment. It has generally been supposed that the decision in the *Texarkana* case would have been the same had the shipment in question consisted of Canadian furs packed in shipping cases, instead of South Dakota wheat. If such supposition is correct, then we should have, and we think properly have, a case of the Railroad Commission of Texas regulating the charge for the intrastate transportation of an article of foreign commerce and, therefore, exempt from taxation by that same state.

If the above conclusion is correct then it may be properly urged that even if contrary to what has been argued herein this Court shall conclude that the lake cargo coal by virtue of its ultimate destination is an article of interstate commerce, the transportation of the same on a separate and distinct bill of lading from the coal fields to the Ports of Huron and Cleveland, without any common arrangement with the vessel carrier for a continuous carriage is an intrastate movement, purposely and rightfully made so by the contract between the owner and the carrier of the commodity and, therefore, subject to regulation by the Railroad Commission of Ohio.

In the Matter of Transportation by The Chesapeake & Ohio Railway Company, et al., Interstate Commerce Commission, No. 3863, decided June 12, 1911, the question presented to the Commission was as to the nature of certain shipments of lime by railroad and as to whether a common control, management or arrangement for continuous carriage or shipment from one state to another between the rail and water carrier existed. The shipments in question were from Eagle Mountain, Virginia, over the line of The Chesapeake & Ohio Railway Company, consigned to "J. B. Flora & Co., care Elizabeth City & Norfolk Steamship Company, Norfolk, Va.," it appearing that the carrier by water transported such lime from Norfolk, Va., to J. B. Flora & Co., at Elizabeth City, N. C. It appeared also that the shipments were billed and treated by the Railroad Company as local shipments to Norfolk, and were delivered there to the water carrier as the representative of the consignee upon payment of the rail carrier's charges up to that point. It appeared further that the water carrier acted as agent of the consignee, paid the charges of the rail carrier and transported the shipments to the destination indicated by the consignee. The Commission under the above state of facts concluded that the evidence disclosed "*a local intrastate shipment by railroad under one bill of lading upon which the purely local rate should be applied and an interstate shipment by a water carrier upon another bill of lading, such water carrier being under no common control, management, or arrangement with the railroad,*" supporting its conclusion by quoting from that part of the opinion in the Texarkana case, which reads:

"In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or obeying the former find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended transportation beyond that specified in the contract. It must be remembered that there is a no presumption that the transfer when commenced is to be continued beyond the state limits and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability imposed by that contract."

As a result of the Commission's conclusion that the shipment in question was a local intrastate movement it stated that it would be proper for the rail carrier to carry out its offer to refund the amount of freight it had collected in excess of the local intrastate rate, and in further support of the understanding of the Commission that the bill of lading determined the nature of the shipment, the following paragraph was quoted from the opinion of this court in the so-called "Social Circle" case (162 U. S., 184):

"All we wish to be understood to hold is that when goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce."

So much for our consideration of the decisions rendered since and in reliance upon the decision of this court in the so-called Texarkana case, more properly described as *Gulf, Colorado & Santa Fe Railroad Company vs. Texas*, 204 U. S., 403.

We come now to a discussion of two recent decisions which, as intimated earlier herein, are in spirit and in *dicta*, if not in result contrary to the doctrine of the *Texarkana* case as it has been generally understood.

Texas & Pacific Ry. Co. vs. Railroad Commission of Louisiana, 183 Fed. Rep., 1005 (C. C., E. D. La., December 22, 1910; aff'd 184 Fed. Rep., 989).

Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U. S., 498 (Feb. 20, 1911).

In the first of the two cases which we have just cited it appeared that the Railway Company had filed with the Interstate Commerce Commission a Schedule of rates for the carriage of lumber from certain points in the interior of Louisiana to New Orleans for export shipment, and also that the Railroad Commission of Louisiana had fixed a different and lower schedule of rates on local shipments between the same points. Four days' free storage were allowed on local shipments and twenty days' free storage on shipments intended for export. Export shipments were also delivered at the ship's side free of charge by the railroad on notice from the shipper. Under these conditions certain cars of staves and poplar logs, intended for export, were shipped from interior points in Louisiana to New Orleans "on bills of lading of substantially the local form." On arrival at New Orleans, however, the consignees demanded and received the free storage accorded export shipments and at their request the cars were also later switched to the ship's side, without additional cost. For the entire service rendered the Railroad collected a higher rate fixed by the Interstate Commerce Commission on export shipments, as a result of which the Railroad Commission of

Louisiana assessed certain fines against the Railroad, the collection of which it sought to have enjoined. The question before the court, therefore, was whether or not the shipments in question constituted foreign commerce and were, therefore, within the jurisdiction of the Interstate Commerce Commission, or intrastate commerce and subject to the control of the State Railroad Commission. The Master to whom the case was referred concluded that the case was governed by the decision in the *Texarkana* case, and recommended that the Bill of the complainant be dismissed. The court, however, reached a contrary conclusion, and held that under the circumstances just stated the freight in question constituted an export shipment, moving in foreign commerce, which was, therefore, beyond the jurisdiction of the Louisiana Commission.

The principal distinction between the above case and the one now under consideration is that in the former the logs in question were intended for export to a foreign country, while in the latter the coal in question is intended for transportation by water to another state. There are, of course, many minor distinctions in fact between the two cases, but unless there is a distinction to be made between the intrastate carriage of commodities intended for export and those intended to be taken to another state—which point will be later discussed, the case above referred to would seem to be contrary in its result to the position of the appellant herein.

The court in his opinion in the Louisiana case agrees with the doctrine stated in the *Texarkana* case to the effect that both the railroad and shipper should be enabled to decide with certainty whether or not any given shipment is interstate or intrastate, but he takes the po-

sition that in the Louisiana case external circumstances indicated that the bill of lading did not constitute the entire contract between the shipper and the railroad company. In other words, this court does not professedly disagree from any conclusion in the Texarkana case, but distinguishes the two cases on their facts. There is, of course, a certain difference in fact, but it is submitted that the conclusion in the Louisiana case is directly opposed to the clearly expressed *dictum* in the Texarkana case which we have quoted earlier herein, and it is further submitted that the court in the Louisiana case proceeded in a manner contrary to the spirit of the ruling and opinion in the Texarkana case, when he went beyond the bill of lading to determine what he understood to be the entire contract between the shipper and the railroad, and especially when he concluded that any further movement of the lumber was a determinative factor in the contract for rail transportation which was only between two points in the state of Louisiana. In other words, it is suggested that the ruling in the Louisiana case opens the door to all the uncertainty which is avoided by the rule understood to have been laid down in the Texarkana case.

The second case above referred to, namely, *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S., 498, involved the jurisdiction of the Interstate Commerce Commission to prohibit certain preferences given by the Southern Pacific Terminal Company to one Young, to whom the Terminal Company had leased one of its piers. The facts in that case disclosed that the Southern Pacific Terminal Company, which owned and operated certain piers for loading and unloading vessels, and The Galveston, Harrisburg &

San Antonio Railway Company, whose tracks alone reached the piers of the Terminal Company, were alike controlled by the Southern Pacific Company; that Young was a merchant and manufacturer engaged in buying for export cotton seed cake and meal in Texas and in other states north of Texas, shipping the cake and meal on bills of lading running only to Galveston, where the same would be delivered to him at a certain pier, which was leased to him by the Terminal Company under conditions which made it possible for him to handle his cake and meal at a cost of from 30c to 40c less per ton than his competitors who were required to handle their cake and meal over the other piers of the Terminal Company at a fixed rate of charge per ton. On this pier Young had facilities for grinding the cake into meal and sacking the same, and from this pier Young made his export shipments.

This court found that under all the circumstances of the case the Terminal Company was "a part of the railway" for the purpose of transporting the commodities in question from interior points to the Port of Galveston in order that the same might be exported and, therefore, ruled that the Interstate Commerce Commission had jurisdiction to forbid the preference complained of.

Near the close of the opinion, the following language is used by Mr. Justice McKenna:

"It makes no difference, therefore, that the shipment of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to The Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a

carrier for transportation to their foreign destination, The Terminal Company being a part of the railway company for such purpose. The case, therefore, comes under *Coe vs. Errol*, 116 U. S., 517, where it is said that goods are interstate, and necessarily as well in foreign commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation.' In *Gulf, Colorado & Santa Fe Railroad Co. vs. Texas*, 204 U. S., 403, the facts are different and the case is not apposite."

If by the above language we are to understand that whenever freight is delivered to a rail carrier on a bill of lading running to a port of shipment, which freight after its arrival at the port of shipment is sooner or later to be exported, such freight is in foreign commerce from the beginning of its rail movement, then it would seem that the language just quoted states a view contrary to the position maintained by the appellant in the present case, unless there is a distinction to be taken between freight transported by rail for export and freight transported by rail for water carriage to another state. The conclusions contained in the language just quoted from the opinion in *The Southern Pacific Terminal* case are, of course, not necessary for the support of the decision arrived at in that case, for as is said in another part of that opinion in reference to certain contentions of the appellant, "this does not distinguish between the meal and the cake, nor between the *meal that is purchased at points outside of Texas and directly exported*, from that so purchased and manufactured on the wharves of The Terminal Company."

In other words, concluding as the court did that the terminal service was really an incident to or part of

the railway service and some of the cake and meal being transported from other states than Texas, it necessarily followed that the discriminations complained of were in part, at least with respect to commerce, clearly interstate, and, therefore, cognizable by the Interstate Commerce Commission.

We have, therefore, the decision of this court in the Texarkana case, to the effect that the intention of a consignor with respect to the future movement of goods in transit after their arrival at destination cannot change the nature of a subsequent shipment, and the statement in the opinion in that case that "the transportation is another thing and follows the contract of shipment, until that is changed by the agreement of owner and carrier," and we have the recent decision in The Southern Pacific Terminal case that the Interstate Commerce Commission has jurisdiction over certain terminal service incident to and inseparable from certain transportation, part of which originates in the same and part in a different state from that in which The Terminal Company operates, but all of which is intended for export, and we have the further statement in the opinion in this latter case that it makes no difference that some of the shipments were from points in Texas on bills of lading running only to Galveston. Owing to the conflict, as we see it, between these two statements as to what is regarded as the law, and in the absence of any decision by this court on facts similar to those in the present case, we submit to the Court the propriety and expediency as well as the logic of adopting the rule that, in every case, transportation, so far as its regulation is concerned, shall follow the contract for that particular transportation.

THE INTERSTATE COMMERCE COMMISSION
HAS NO JURISDICTION OVER THE TRANS-
PORTATION UNDER CONSIDERATION.

The first section of the Act to Regulate Commerce provides that the Act shall apply to

"any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or *partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment*), from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry, either in the United States or an adjacent foreign country: Provided, however, that the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one state and *not shipped to or from a foreign country from or to any state or territory as aforesaid.* * * *." (Italics ours.)

With respect to this section, it will be observed in the first place that, by its plain and express provisions, it applies only to joint land and water transportation between the different states when a common control, management or arrangement between the connecting car

riers for a continuous carriage exists. Notwithstanding this limitation and notwithstanding the undisputed evidence that no common arrangement existed in this case between the railroad and any of the lake vessels (Rec., p. 95), and that the coal shippers themselves procured these vessels (Rec., pp. 85, 91), both of the courts below in the opinions rendered by them in the present case have stated and apparently relied upon their conclusions to the effect that the Interstate Commerce Commission had jurisdiction over the shipments of lake cargo coal from the Eastern Ohio coal field to the ports of Huron and Cleveland, Ohio, for trans-shipment by vessel to the states at the head of the Great Lakes.

The final paragraph of the opinion rendered by the court of original jurisdiction reads thus:

"I, therefore, conclude that the Railroad Commission of Ohio has no authority to fix a rate on which lake cargo coal, as defined in the present practice of Railroad Companies, should be carried, *but that it is subject only to the authority of the Interstate Commerce Commission.*" (Italics ours.)

And early in the opinion the same court said:

"It is insisted that with respect to this coal, there is no common control, management or arrangement for a continuous carriage or shipment between the rail carrier and the water carrier, as provided in the Interstate Commerce Act, and that without this there can be no interstate character given to the coal. As to this the answer is that when the Railroad agrees to haul and load for 90c as against a higher rate when not destined to another state, there is made in effect an arrangement between the rail carrier and the water carrier. It is not made with some particular water carrier, but it is made with whatever water carrier the operator arranges with to take the cargo."

Now we submit that the court was clearly in error in concluding that, under the existing circumstances, there was any common arrangement within the purview of the Interstate Commerce Act. In this connection we call attention to the fact that there was no common arrangement in the form of a through bill of lading, nor in the nature of any agreement for a division of the rate, nor in any other way. The railroad and vessel carriers acted distinctly independent of each other, not only with respect to their charges, but with respect to the movement of their transportation facilities. We also call the attention of the Court to the following case which, we submit, fully sustains our contention in this matter:

Mutual Transit Co. vs. United States, 178 Fed. Rep., 664 (C. C. A., 2nd Circ., 1910)

In this case action was instituted by the United States against The Mutual Transit Company for alleged violation of the Elkins Act, and the principal question involved was whether or not The Mutual Transit Company, a corporation engaged in operating a line of steamships from Buffalo, New York, to West Superior, Wisconsin, was subject to the Elkins Act under the circumstances of the case. It appears from the facts that The Mutual Transit Company had agreed with The Cambden Iron Works that it would guarantee that the carriage of certain iron pipe by rail from a point in Pennsylvania to Buffalo, New York, and thence by water on the boats of the Transit Company would cost but 45c a hundred pounds. The iron pipe in question was shipped by rail over The Philadelphia & Reading Railway to Buffalo, and was in fact billed through to the point of destination on divisional rates filed with the Interstate Commerce Commission, but these divisional

rates and the filing of the same had not been agreed to by The Mutual Transit Company.

Under these circumstances the court held that The Mutual Transit Company was not subject to the provisions of the Interstate Commerce Act, for the reason that no common arrangement for a through transportation existed.

On page 666 of the Report will be found the following language:

“The phrase ‘*common arrangement*’ in view of its context evidently means an agreement or understanding between connecting carriers with respect to the transportation of merchandise, and the charges and divisions of the charges to be made therefor. *A mere agreement by an independent water carrier to accept freight from a connecting railroad and to transport it over its own particular road might be an ‘arrangement’ for continuous carriage, but would not be a ‘common arrangement’* * * . *The real arrangement under which this freight moved was made between the defendant (The Mutual Transit Company) and the shipper. The defendant entered into no agreement with the other carriers. They were not parties to its agreement with the shipper.*” (Italics ours.)

In this connection reference may again be made to the case of *Ex Parte Koehler*, 30 Fed. Rep., 867, probably the very first case which interpreted the jurisdiction of the Interstate Commerce Commission and in which the court directed the Receiver of a Railroad which carried the goods from the interior of the State of Oregon to the Port of Portland for further carriage by vessel to San Francisco, that he need not report to the Interstate Commerce Commission, because such carriage by rail was not within the provisions of the Interstate Commerce Act.

A part of the opinion rendered in that case reads as follows (p. 869):

"The mere fact that a railway wholly within a state and a vessel running between said state and another meet at a point within the railway state, and thus form a continuous line of transportation between the two states, by the one taking up the goods delivered by the other at its terminus, and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a 'common control'—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

This language is quoted with approval in a very recent decision handed down by the Commerce Court, in which it held that the Interstate Commerce Commission had no control over the business of water carriers which was not transacted under a joint arrangement with a rail carrier.

Goodrich Transit Company vs. Interstate Commerce Commission, 190 Fed. Rep., 943 (1911).

See also:

United States ex rel., etc. vs. Lehigh Valley Rd. Co., 115 Fed. Rep., 373.

United States ex rel., etc., vs. Chicago, etc., Rd. Co., 81 Fed. Rep., 783.

Interstate Commerce Commission vs. Bellaire, etc., Ry. Co., 77 Fed. Rep., 942.

From a late ruling of the Interstate Commerce Commission hereinbefore referred to *In the Matter of Transportation by The Chesapeake & Ohio Railway Company*, made June 12, 1911, and in which the Commission ruled that it had no jurisdiction with reference to rail shipments of lime made from a point in the state of Virginia to Norfolk, Virginia, for trans-shipment by vessel to North Carolina even when the freight was shipped in care of a vessel carrier which paid the rail charges in behalf of the consignee, it also appears that the Interstate Commerce Commission at the present time does not regard that it has jurisdiction over transportation such as that involved in the case at bar.

We should perhaps state in this connection that since the opinions were rendered in this case below by the Circuit Court for the Northern District of Ohio, Eastern Division, and the United States Circuit Court of Appeals for the Sixth Circuit, stating that the Interstate Commerce Commission had jurisdiction over the transportation in question, the same association of coal operators which instituted the proceedings before the Railroad Commission of Ohio, whose order gave rise to the present litigation, has also instituted a complaint with respect to the rates in force on the same traffic before the Interstate Commerce Commission, and has introduced testimony before that Commission, in order that no possible avenue for relief might be overlooked, but in view of the express wording of the Interstate Commerce Act and the ruling made by the various Federal Courts, we do not see how any order that the Interstate Commerce Commission might make would be sustained by the courts, for we submit that a considera-

tion of the facts in this case in the light of the language of the Statute and of the decisions of the courts and the Interstate Commerce Commission, must lead to the conclusion that no authorized relief can be obtained by the coal operators in Eastern Ohio from that Commission, for the reason that the commerce in question is not within the provisions of the Act.

In this connection, we desire to call the attention of this Court to certain of its decisions in which it has been stated that it was the object of Congress, in the Act to Regulate Commerce to cover with certain named exceptions the entire field of interstate and foreign commerce.

In *Texas & Pacific Railway Co. vs. Interstate Commerce Commission*, 162 U. S., 197, 212, after stating that it would be reasonable to suppose that the legislation embraced in the Interstate Commerce Act would comprehend the entire interstate and foreign commerce, except as express limitations might be found in the Act, the opinion continues thus:

“It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between the states and territories as that going to or coming from foreign countries * * *.”

“Having thus included in its scope the entire commerce of the United States, foreign and interstate and subjected to its regulations all carriers engaged in the transportation of passengers or property * * * the section proceeds to declare that all charges, etc., * * *.”

In *Armour Packing Co. vs. United States*, 209 U. S., 56 (1908), Mr. Justice Day, in discussion the question of whether or not the shipments under a through bill of

lading from an interior point in the United States to a foreign port were embraced in the provisions of the Elkins Act making it an offense to obtain transportation of property in interstate or foreign commerce at less than the carriers' published rate, in order to support the conclusion that the Elkins Act did embrace the rail haul, although made under a through bill of lading, referred back to the Act to Regulate Commerce passed in 1887, and spoke as follows with respect to it, as is shown by page 78 of the Report of that case:

"The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of Section 1 of the original Act of 1887, and in the declaration of the scope and purpose of the Act declared in its title. *Texas & P. R. Co. vs. Interstate Commerce Commission*, 162 U. S., 197, 211. There is no attempt in the language of the Act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary the Act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment."

If, as stated in the opinions of the two cases just quoted from, the Act to Regulate Commerce defines and describes all interstate commerce, and if, as we have tried to show, the Act does not cover the commerce in this lake cargo coal, it would seem to be a necessary conclusion that the transportation of that coal is not interstate, and that that transportation is consequently a proper subject of supervision for the Railroad Commission of Ohio.

Before leaving our consideration of the Interstate Commerce Act it seems proper to advert to the refer-

ences which have been made several times hereinbefore to the possibility of there being a distinction between transportation by rail from a point within a state to a port in that state when the freight transported was intended on the one hand for export to a foreign country, and on the other hand for carriage by vessel to another of the United States.

Abstractly reasoning, we cannot see why, if freight carried by rail from Louisiana points to New Orleans and marked "for export" is in foreign commerce from the time it leaves the original Louisiana points, a corresponding shipment of freight by rail from Ohio points to Huron, marked "lake," for subsequent water carriage is not in interstate commerce from the time it leaves those Ohio points. Consequently, it seems to us, as a matter of strict reasoning that a distinction between rail movements in anticipation of foreign commerce by water on the one hand and of interstate commerce by water on the other hand does not exist. And notwithstanding the fact that there is expressly included within the provisions of the Act, transportation of property from a point within a state to a port of transshipment in that state when the property in question is to be carried to a foreign country, but no provision for a similar transportation when the property in question is to be carried from the port of entry to another of the United States, we still think that these two transportations are regarded by the Act in the same light and are properly so regarded.

An examination of the section of the Act quoted herein a few pages earlier discloses that it first defines and describes commerce in this country subject to the Act, including therein joint hauls by rail and water un-

der a common arrangement. Then, under the "also" clause, it provides for transportation "*in like manner*" of property shipped to a port of trans-shipment, thence to go to a foreign country. We submit that this phrase "*in like manner*" refers back necessarily to the "common control, management or arrangement" clause used in establishing the scope of the Act as to joint land and water hauls between the states, and that the Commission therefore has jurisdiction over so-called export rail shipments originating in the same state as the port of shipment only when they are made under some sort of a common arrangement between the rail and ocean carrier. We submit further that the existence or non-existence of the necessary common arrangement is equally the proper test for determining whether the United States or a state has jurisdiction over the transportation by rail to port—whether it be an inland lake port or an open ocean port.

It has been held by this Court in the "Import Case" and the "Armour case," both referred to earlier herein, that the Interstate Commerce and Elkins Acts apply to the rail portion of foreign shipments where a common arrangement for through transportation exists, but we do not believe that it has been so held where no such arrangement exists, and submit that it should not be so held.

Owing to the fact that in the case we are now considering a joint rail and water haul exists, we do not deem it advisable to refer at any length to statements sometimes made that the Hepburn Amendment of 1906 to the Interstate Commerce Act, by substituting parentheses for commas at the beginning and ending of the phrase, "or partly by railroad and partly by water when

both are under a common control, management or arrangement for a continuous carriage or shipment," in the first section of the Act, extended the jurisdiction of the Interstate Commerce Commission over rail carriers to cases in which no common arrangement for through transportation existed. Let it suffice to say on this point, firstly, that we see no necessity for construing this rhetorical change as effecting any such result; secondly, that if the original Act covered the whole field of Interstate Commerce, no additional scope could be constitutionally given by Congress to the Commission; and, thirdly, that, even assuming such a change both constitutional and intended, and further assuming the coal now under consideration to be in interstate commerce, the transportation thereof would not be subject to regulation by the Interstate Commerce Commission for the reason that it is not "transportation * * * *wholly by railroad* (* * *) from one state * * * to any other state * * * of the United States * * *," as prescribed by the first section of the Act, exclusive of the parenthetical clause just referred to, but, on the contrary, is transportation partly by rail and partly by water, without either continuous carriage or common arrangement.

We, therefore, contend that in no possible aspect of the facts or the law, can it be concluded that the Interstate Commerce Commission has jurisdiction to establish the rate on the traffic affected by the order of the Railroad Commission of Ohio.

THE DECISION OF THE COURT BELOW.

We are here in this Court insisting that the Circuit Court of Appeals erred in its decision that the order of the Railroad Commission of Ohio unconstitutionally interfered with Interstate Commerce. That decision may be adjudged by this Court to be right or wrong, but if it be adjudged right, we submit that it cannot be so adjudged for the reasons given in the opinion handed down by the court.

In reaching the conclusion arrived at by the Circuit Court of Appeals the opinion discusses four matters.

In the first place the opinion states that the regulation of the rate in question is within the jurisdiction of the Interstate Commerce Commission, the language on this point reading thus (Rec., p. 114):

“We think it unimportant to inquire whether the Interstate Commerce Commission has hitherto prescribed any rates for the particular service which is the subject of this suit. *It is enough that the matter is within its control*, and for aught we know that Commission may have not deemed it necessary to take action upon the subject, being satisfied with existing conditions.” (Italics ours.)

Of course, if the preceding statement is correct the conclusion of the court is sound, for jurisdiction by the Interstate Commerce Commission necessarily presupposes the existence of interstate commerce. For reasons hereinbefore given, however, we contend that by the clear provisions of the Act to Regulate Commerce, the Interstate Commerce Commission has no control over the commerce now under consideration, because of the absence of any common arrangement for a continuous carriage. We have also earlier herein given both reason and authority going to prove that such common ar-

rangement between the land and water carrier did not exist in our case and could not exist where the shipper and not the rail carrier arranged for the water haul. The only statement in the opinion of the Circuit Court of Appeals referring in any way to the existence of the common arrangement required by the Act is a single sentence where in discussing the conduct of the rail carrier in unloading the coal into the vessel, the court remarks that by so doing the rail carrier (Rec., p. 115)

“participated in making the connection for a continuous transportation of the coal from the mines to its ultimate destination in the Upper Lake Ports.”

We confess ourselves utterly unable to understand how the unloading of this coal by the Railroad into the hold of a vessel procured exclusively by the owner of the coal or his vendee, and absolutely subject to his control, can amount to a common arrangement between the railroad and vessel carrier for a through transportation.

There is no dispute as to the facts on this point. The testimony shows clearly that the rail carrier has nothing to do with the arrangement for the water haul. This is shown by the extracts from the testimony of Mr. Maurer and Mr. Osborne found on pages 85 and 91 of the Record and quoted earlier herein, and also by the admission of the appellee himself, where he states that there is “no direct arrangement,” and that “if the fact that the shipper furnishes the boat and arranges the contract for the boat is not an indirect arrangement, why we have no arrangement” (Rec., p. 95).

We submit, therefore, that no “common control, management or arrangement for a continuous carriage or shipment” exists and that the Interstate Commerce

Commission has no jurisdiction to regulate the rate in question, even under the assumption that the coal in question is in interstate commerce during its movement from the mines to the lake front.

The opinion of the Circuit Court of Appeals states in the second place that (Rec., p. 114),

“while such an order as that made by the Railroad Commission might have been a valid exercise of its power before the time when the Federal government undertook the exercise of its own authority granted by the commerce clause of the Constitution, as it has done in recent years, yet in view of the legislation by Congress concerning the duties and liabilities of railroad companies engaged in Interstate Commerce, the power of the states has been greatly circumscribed.”

In answer to this statement which, of course, assumes that the coal in question is an article of interstate commerce, we beg leave to suggest our belief that if the State of Ohio ever had power to regulate the rate in question it still had that power at the time the order complained of was made, and still has that power. We submit that by no Act of Congress has it ever taken over or attempted to take over the regulation of the commerce in question. Even under the assumption that this commerce is interstate, Congress has not only not assumed its regulation, but has by necessary implication declined to assume such regulation by creating the Interstate Commerce Commission, and limiting its jurisdiction over joint rail and water transportation to instances in which there exists a common arrangement for a through carriage. If there was ever a case for the application of the maxim “*expressio unius et exclusio alterius*,” it seems to us it is found here.

But assuming that the commerce in question is interstate, and further assuming, contrary to the express provisions of the Interstate Commerce Act, that Congress by that Act authorized the Interstate Commerce Commission to regulate this traffic then, if the state, prior to the passage of the Act to Regulate Commerce had power, as suggested by the Court of Appeals, to make the order attacked, the state still retained and retains that power owing to the fact that the Interstate Commerce Commission has never acted in the premises, for this Court has expressly held that the mere delegation of power to the Interstate Commerce Commission is not such an Act of Congress as will effect a change from State to Federal control.

Missouri Pacific Railroad Co. vs. Larabee Flour Mills Company, 211 U. S., 612.

In this case it was said (p. 623):

"On the other hand it is said that Congress has already acted, has created the Interstate Commerce Commission and given it a large measure of control over interstate commerce * * *. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. *In other words the mere grant by Congress to the Commission of certain national powers in respect to Interstate commerce does not of itself and in the absence of action by the Commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens * * *.*" (Italics ours.)

We submit that so far as the conclusion of the court below rested on the foundation that Congress had acted and taken over control formerly properly exercisable by the State, it is unsound. It seems to us that not only has the Interstate Commerce Commission not acted, but that we have also here a case in which "the silence of Congress" approaches eloquence in its apparently intentional omission of any grant of power over such transportation as is now under consideration.

In the third place this opinion justified in part its decision in the present case by stating a distinction between the present case and the case of *United States vs. Geddes*, 131 Fed. Rep., 452, decided some years ago by that same court, and which case has been stated and quoted from earlier herein in support of the argument for appellant. Now there are certainly distinctions in fact between the present case and the *Geddes* case, and it may be that those distinctions are such as to justify a different conclusion in those cases, but we think that when the court below stated in its opinion that the *Geddes* case (Rec., p. 114),

"was rested upon the peculiar circumstances of that case and particularly upon the facts that the Railroad Company's contract for transportation had been completely performed when it deposited the goods at its own station and it had nothing to do and was in no wise concerned with their future disposition, whether they should be taken away by the consignee or some other Railway Company by his authority,"

its recollection of the facts in that case were not quite clear, for on page 453 of the Report of that case, it is stated that:

"No through bills of lading for such freight were issued by either road, no through rate was

fixed by mutual arrangement, and no conventional division of a through freight charge was made. Each road charged and collected its local freight rate in this way: Freight transported to Bellaire by the defendant road and marked for a point in another state was delivered to the agents of The Baltimore & Ohio *with an expense or transfer bill which stated the original point of shipment, the consignee and place of consignment, and the freight charges of the delivering road. Way bills also accompanied the traffic. On taking charge of the freight The Baltimore & Ohio would assume the payment of the freight charges of the defendant road, collecting the entire charges on delivering the freight at its destination. The same method was pursued with respect to freight coming from outside Ohio * * *. There were weekly settlements between the two roads of these collections and the payment of any balance found to be due on such settlements; but each road became responsible for the freight charges of the other, whether they were ever collected from the consignee or not. Such transfers of traffic were made nearly every day. Each Company's freight charges were in accordance with its own rates.*" (Italics ours.)

Under the agreement existing between the two connecting roads in the Geddes case, by which each terminal carrier in turn assumed the payment of the charges of the initial carrier and received regularly and daily freight bound to or coming from another state and so marked, all the shipper had to do was to hand his freight to the initial carrier and the two railroads thus working together conveyed the same to its destination where the consignee might receive the same and pay the entire freight charge.

In the present case none of the above agreements or understandings referred to exists between the rail and

water carriers and the freight is re-delivered by the rail carrier to the shipper or his vendee. Further in the present case no more public announcement with respect to the ultimate destination of the commodity transported exists than occurred in the Geddes case. Again, in the present case there is a breaking of the bulk of the units of rail shipment at the lake front, which by an application of the "Original Package" doctrine would result in terminating the commerce to which the coal had been subject in its trip to the lake front. This necessary breaking of bulk in order that new units of shipment for the water haul may be created seems, under the provisions of Section 7 of the Interstate Commerce Act to amount to a division of the entire transportation of the coal into two separate and distinct parts, for it is provided in that section that "no break of bulk * * * shall prevent the carriage * * * from being continuous * * *, *unless* such break * * * was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage * * *."

No breaking of bulk or interruption of any kind occurred in the Geddes case and comparing the circumstances of that case with the present one we are unable to understand why the coal in the present case should be considered in interstate commerce and the commodities in question in the Geddes case, considered by the same court to be intrastate commerce. It is the position of appellant herein that the decision in the Geddes case is correct and that the present case is indistinguishable from that case in principle and should have been decided in the same manner.

The fourth matter relied on in the opinion below

was the fact that the rail carrier made but one charge for the entire service rendered—which service included the unloading of the coal from the cars to the vessels. Of this service the opinion states (Rec., p. 115):

“By the very terms of the service which The Wheeling & Lake Erie Railroad Company contracted to perform, it was required to deliver the coal into vessels provided to receive it and to load the vessels with the coal properly distributed in their holds and the cargo trimmed for its further transportation to the ports of other states. And this was included in the service for which the Commission fixed the rate of 70c per ton. It was a service which if the transportation had been ended by a delivery on its own docks or into its own warehouse would have been required to be performed by the subsequent carrier.”

Now as a matter of fact and as a matter of practice the lake vessels do not load or unload their own bulk cargo. Independent concerns construct extensive plants for this purpose and perform this work. This matter, however, has been discussed at length earlier herein, where we attempted to show how impracticable and unsatisfactory and even absurd it would be to characterize the commerce in this coal by the varying manner in which this unloading service is performed from time to time and from place to place as the policy or caprice of the railroad dictates and requires.

We therefore, with all due deference respectfully submit that the decision rendered in the court below finds no proper justification in the reasons for that decision contained in the opinion handed down.

CONCLUSION.

In the foregoing we have attempted to give a fair and full statement of the facts connected with the situation now before the Court and to show, from an analysis and discussion of the cases bearing on the question, the reasons why it was not an unlawful or unconstitutional regulation of commerce which the Railroad Commission of Ohio attempted when it made the order establishing the rate for the transportation of lake cargo coal from the mines to the lower lake ports. We have tried to show that that transportation constituted an intrastate movement properly supervisable by the Ohio Commission and, incidentally, we have shown why, in our opinion, the Interstate Commerce Commission has no jurisdiction over that movement.

The major part of our argument has been in support of the proposition that the movement in question was intrastate, because the contract of carriage between the shipper and the carrier called only for carriage between two points both within the State of Ohio and the delivery of the coal at the point of destination to the shipper or his order. As a brief summary of much that we have said on this point we quote the following from *Cooke, Commerce Clause of the Constitution*, Section 26:

"It seems clear enough that, transportation otherwise subject to regulation under the commerce clause, is not removed from its operation merely because of being carried on by different agencies, some acting entirely in one State. Thus a contract for continuous transportation, say from Philadelphia to a point in a distant western State, under a through bill of lading, is doubtless subject to such regulation, even as to transportation between Philadelphia and Pittsburgh, and on the supposition that that part of the transportation is performed by a

carrier whose agency in the transportation is confined to such part. *The application of the commerce clause in this respect is well illustrated by the Interstate Commerce Act, applicable by its terms to carriage 'under a common control, management, or arrangement, for a continuous carriage or shipment.'* It should be borne in mind that such provision does not necessarily exhaust the power of Congress in this respect, and transportation by an independent agency wholly within a State may be well within the scope of the commerce clause, though not within such provision. *It seems, however, the better view that even continuous transportation between points in different States is not, as to such transportation by an independent agency wholly within a State, included in the subject of regulation, in the absence of any arrangement for continuous transportation. If the existence of such arrangement as a necessary condition be dispensed with, the alternative seems to be that a mere purpose or intent of the shipper at the time of shipment (or it may be, afterward) that transportation shall be to a point outside of the State, is sufficient to bring it within the scope of the commerce clause.* There seems, however, to be serious practical, even if not legal, objection, to making the determination of the character of the transportation as subject, or not subject to regulation under the commerce clause, rest on so vague and uncertain a test as the purpose or intent of the shipper commonly a matter of much difficulty to satisfactorily prove." (Italics ours.)

To the preceding it may be answered that the coal is marked "lake" coal when it leaves the mines and that, of the coal so marked, the great bulk is undiverted *en route* and becomes cargo coal rather than commercial or vessel fuel coal, on its arrival at the lower lake ports, and hence is finally charged the rate which the carrier has chosen to impose on cargo as distinguished from other coal handled under conditions practically identical,

the result being that there is absolutely no doubt that it is the intention of the shipper later to take, or to sell to others who will take, a large but as yet unidentified portion of this coal to other states. To such an argument we reply, firstly, that it is our position that the fact that a shipper's intent is honestly and openly or even necessarily disclosed to all the world, including the carrier, does not make it just to penalize such a shipper. We have always understood that one of the main objections to permitting the intention of the shipper to characterize his shipment was that it was too uncertain a test, such intention being sometimes obvious, sometimes suspected and sometimes unknown. Secondly, we reply that this argument does not touch at all our position that the rail movement of this coal to the lake front, as we have described it, is but a preliminary and independent movement to a common assembling point, from which assembled mass, vessel cargoes may be extracted for shipment to other states. It must be borne constantly in mind that, in his dealings with the rail carrier, it is the dominant object and intent of the shipper and the sole necessary result of his contract with the rail carrier that his coal shall be taken to the lake front and there handed back to him or his appointee or vendee. This is the one immediate result of that contract, and not until after that has been accomplished does the coal operator or his vendee finally release any coal into the channels of interstate commerce. *The only prescribed destination* of this coal while in the possession of the carrier is a point within the State of Ohio, and we contend that it was never the intention of the individual states in adopting the Federal Constitution to preclude themselves from regulating contracts for the sale of transportation to be per-

formed exclusively within their own confines. It is open to the shipper and connecting carriers to make arrangements for either local or through transportation. If they choose to contract for a local movement, we contend that the local law should govern; if for a through movement, that the national law should govern.

The nature of the movement of this coal is not and cannot be affected by any trade name which the carrier may choose to give to the coal thus carried. The fact that the carriers refer to this traffic as "lake" coal or that they may regard the rate in question as a "proportional" of a through rate cannot characterize this traffic. It is well known that railroads do sometimes make—whether properly or not we need not here discuss—what they call a "proportional" rate on traffic originating at a point prior to or going to a point subsequent to the points between which such "proportional" rate applies—even though all points considered lie within the same state, as, for instance, in the case of so-called railway fuel rates. This practice, under circumstances like those here considered, the Interstate Commerce Commission has condemned in a recent administrative ruling, "*Fourth Section Circular Number one*," issued March 13th, 1911, in which it defines a "proportional" rate thus:

"A proportional rate is defined as one which applies to part of a through transportation which is entirely within the jurisdiction of the Act to regulate commerce; that is, the balance of the transportation to which the proportional rate applies must be under a rate filed with this Commission. A rate to a port for shipment beyond by water carriage not subject to the provisions of this Act would not be a proportional rate."

But however this may be, the thought is that it is the carriers' business to sell transportation, and if he chooses to sell and the shipper to buy, transportation for a commodity only between two points in the same state, the power and authority of that state are not ousted by the open or concealed intent of the shipper, by any nominal characterization on the part of the carrier of the rate imposed on the commodity transported, or by the joint connivance of both shipper and carrier.

The coal shippers in the No. 8 field purchase from the rail carriers transportation only from the mines to the lower lake ports, all in the State of Ohio; during the rail transportation to these ports, none of this coal has any definite or prescribed destination beyond that state: this coal is necessarily assembled at these points in large quantities; there a storage or demurrage charge is exacted by the railroad for more than seven days' delay in unloading it, and there it is transferred from the cars and transformed into new shipping units; the ownership of the greater part of the coal changes there and from there an independent vessel carrier, not subject to the Act to Regulate Commerce, and chartered by the shipper or his vendee, comes to the rail carriers' dock and receives the coal in the same manner as if the shipper or vendee brought his own vessel or train or wagon and received the coal; the Interstate Commerce Commission does not have jurisdiction to regulate the charge for this rail transportation. We contend, therefore, that the rail carriage of this coal is an intrastate movement, local to the State of Ohio, that the Railroad Commission of that state had and has jurisdiction thereover, and that the

order made by it was and is legal and binding on the appellee herein.

We, therefore, respectfully submit that the judgments of the courts below should be reversed.

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8

No. 776

UNITED STATES COURT, U. S.
FILED.

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JAMES H. MCKENNEY,
CLERK.

In the
Supreme Court of the United States.
October Term, 1911.

RAILROAD COMMISSION OF OHIO,
APPELLANT,

vs.

**B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,**
APPELLEE.

BRIEF FOR APPELLEE.

W. B. SANDERS,
W. M. DUNCAN,
Solicitors for Appellee.

1911

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17

INDEX.

	Pages.
I. STATEMENT OF THE CASE	3-15
(a) The Pleadings and Proceedings.....	3-6
(b) Statement of the Case	6-15
(1) Findings of the Lower Courts.....	6-8
(2) The Evidence	8-15
II. ARGUMENT	15-68
(a) The Court Does Not Have Jurisdiction on Appeal	15-16
(b) Petition for Writ of Certiorari Should Be Denied	16-18
(c) The Order of the Railroad Commission of Ohio is Void	18-68
(1) The Findings of the Circuit Court and Circuit Court of Appeals Should be Followed	18
(2) Lake Cargo Coal is Interstate Com- merce	19
(3) Cases Supporting Position of Appellee	23
(4) Congress Has Exclusive Jurisdiction Over Interstate Rates	42
(5) Cases Cited by Appellant Not Applicable	47
III. CONCLUSION	68-72

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—o—

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—o—

I.

Statement of the Case.

(a)

THE PLEADINGS AND PROCEEDINGS.

On May 10th, 1909, the Pittsburg Vein Operators' Association of Ohio filed a complaint with the Railroad Commission of Ohio against The Wheeling & Lake Erie Railroad Company attacking the reasonableness of the existing rate on lake cargo coal from the No. 8 district in Ohio to the hold of vessels at Lake Erie ports reached by said railroad. Subsequently the Railroad Commission of Ohio heard the complaint over the protest of the railroad company contending that the rate on lake cargo coal from the No. 8 district was applicable only to interstate commerce engaged in by the parties, and on the 28th day of February, 1910, entered an order against The Wheeling & Lake Erie Railroad Company and its Receiver fixing a rate of seventy (70) cents per ton F. O. B. vessel, Lake Erie ports, on lake cargo coal in lieu of the existing rate of ninety (90) cents per ton, F. O. B. vessel, Lake Erie

ports (R., 22, 23). A copy of this order was served upon the Receiver of The Wheeling & Lake Erie Railroad Company March 23rd, 1910, and by virtue of the statutes of the State of Ohio, provided such order of the Railroad Commission of Ohio is a law of the State of Ohio, would have become effective April 22, 1910, except for the proceedings taken by the Receiver in this cause asking relief upon the grounds set forth in the bill of complaint filed in the United States Circuit Court (R., 2).

On March 28th, 1910, the Receiver of The Wheeling & Lake Erie Railroad Company filed a bill of complaint against the Railroad Commission of Ohio and others attacking the legality of the order of the Railroad Commission of Ohio on the ground, among others, that the order regulating the rate on lake cargo coal from the No. 8 district, F. O. B. vessels at Huron and Cleveland, in earload lots, directly affected and interfered with the interstate commerce engaged in by the complainant below, over which the Railroad Commission of Ohio had no authority or power, inasmuch as the regulation of such commerce is vested in the federal government under the provisions of the Constitution of the United States. Pleas to the jurisdiction of the court were filed by some of the defendants, but subsequently withdrawn. The Railroad Commission of Ohio filed its answer to the bill of complaint on June 25, 1910 (R., 50), and the complainant filed his replication on the same day (R., 57).

The cause came on to be heard upon the bill of complaint, the answer and the replication and the testimony offered by the parties in support of their respective claims relating to the character of the commerce to which the lake cargo rate applies. The court found with the receiver of the railroad company that the lake cargo rate applied only to coal transported from a point within the State of Ohio to a point outside the State of Ohio, and held that the Railroad Commission of Ohio had no power

to prescribe the rate or rates to be charged thereon, and accordingly entered a decree declaring the order of the Commission void and of no effect and enjoined the Railroad Commission from enforcing the order (R., 118). The Circuit Court did not consider the other grounds attacking the validity of the order, deeming it unnecessary in view of its conclusion respecting the character of the commerce to which the rate applied (R., 118).

The Railroad Commission of Ohio perfected an appeal to the Circuit Court of Appeals for the Sixth Circuit from such judgment and decree of the Circuit Court. Subsequently the receiver filed in the Circuit Court of Appeals a motion to dismiss the appeal, claiming that appeal did not lie to the Circuit Court of Appeals but direct to the Supreme Court, because the jurisdiction of the Circuit Court was invoked on the ground that a law of the State of Ohio, to-wit, the order of the Railroad Commission of Ohio, violated the United States Constitution. The Circuit Court of Appeals overruled the motion, holding that the proceedings attacking the validity of the order were ancillary to the main proceeding in which the Circuit Court had taken possession of the property through the intervention of its receiver, jurisdiction in which case was based upon diversity of citizenship of the parties. *The Circuit Court of Appeals then proceeded to hear the case upon its merits, and having reached the same conclusion as to the probative effect of the testimony respecting the character of the commerce to which the rate in controversy applies, sustained the judgment and decree of the Circuit Court.* (*Railroad Commission of Ohio vs. Worthington, Receiver*, 187 Fed. Rep., 965, 966).

After the receiver, the appellee, had filed in the Circuit Court of Appeals a motion to dismiss the appeal, but before the same was heard, the Railroad Commission of Ohio, appellant herein, undertook to perfect an appeal

to this Court direct from the Circuit Court. This appeal is cause No. 505, October Term, 1911, entitled "Railroad Commission of Ohio, Appellant, vs. B. A. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company, Appellee." After the Circuit Court of Appeals had passed upon the motion to dismiss and had decided the case as stated above, the Railroad Commission of Ohio undertook to perfect an appeal from the Circuit Court of Appeals to this court. This appeal is cause No. 776, October Term, 1911, with the same title as in cause No. 505.

Subsequently the Railroad Commission of Ohio filed in this court in cause No. 776 a petition for writ of certiorari and a motion to consolidate said causes Nos. 505 and 776 and to advance the same for hearing. Thereupon, the appellee herein filed a motion for leave to file certain exhibits, advising the court of the fact that the Interstate Commerce Commission now has under investigation the readjustment of lake cargo rate from Pennsylvania, West Virginia and Ohio coal-producing districts, to the end that if the court in its judgment deemed it proper so to do it might consider such fact in determining the application for the writ of certiorari. The motion to advance and consolidate the causes and the motion for leave to file exhibits were granted.

(b)

STATEMENT OF FACTS.

(1)

FINDINGS OF THE LOWER COURTS.

The Circuit Court and the Circuit Court of Appeals reached similar conclusions as to the probative effect of the testimony offered by the parties relating to the character of the commerce to which the rate in controversy applies. The Circuit Court in its opinion uses the following language (R., 100):

"It seems to me that a consideration of the facts

can lead to no other conviction than that this lake-cargo coal has, when started on its journey, taken on the character of interstate commerce; the rate itself is fixed as an interstate rate; it is ninety cents only if and because there is to be a further transportation into another State at a rate which is fixed in consequence of a rate which the complainant charges.

"The complainant receives the ninety cents for (a) carrying the coal to the lake (b) loading it on a vessel which intends to, and must practically, carry the coal to some Northwestern port, and (c) trimming the coal in the hold so that it will carry safely.

"The loading and trimming are done for no other purpose than to contribute that much to the transportation to another State; in the sense of commerce as it is and must be carried on, it is mere sophistry to say that it might be unloaded at some other Ohio port; business could not be done as business, and is not done, in that way. But even if it were so done, it would immediately lose its character as lake-cargo coal and become subject to the rate on commercial coal, namely, \$1.00."

The decree of the Circuit Court reads in part as follows (R., 102):

"* * * and being fully advised in the premises finds with the complainant on the issues joined with reference to the character of such commerce and that the allegations of the bill of complaint respecting the character of the commerce to which the lake cargo rate is applicable are true, that the lake cargo rate involved in this controversy applies only to coal transported from a point in the State of Ohio, to-wit, the No. 8 District, to a point outside the State,
* * *"

The Circuit Court of Appeals in its opinion, passing upon the merits of the case, use the following language (R., 113):

"At the hearing in the Circuit Court, on the pleadings and proofs, Judge Tayler presiding, it was (as appears from his opinion sent up with the record) found, upon a recital of the facts as gath-

ered from the evidence that the rate of 70 cents per ton was intended to apply to lake cargo coal destined for transportation to the Upper Lake ports, that is, to ports in other states and to such transportation only. We are satisfied, upon an examination of the evidence upon that point, that the conclusion of the learned judge was correct * * * .”

(2)

THE EVIDENCE.

The evidence presented supporting the conclusions so reached by the Circuit Court and the Circuit Court of Appeals shows substantially as follows: Bituminous coal for tariff purposes is classified by the appellee as (a) railway fuel, (b) lake cargo, and (c) commercial coal. The first comprises coal sold to carriers at junction points and used by such carriers for fuel purposes. The second includes coal going from mines in the State of Ohio to points in the vicinity of the head of the Great Lakes and thence to points in the northwestern part of the United States via rail from mines to ports on Lake Erie in Ohio known as the lower lake ports, and thence by vessel to ports at the head of the Great Lakes (R., 60, 61, 62, 63, 64, 65, 68, 69). The third comprises coal used for commercial purposes, either at points on the appellee's line or points on the lines of connecting carriers (R., 70).

The No. 8 coal district of Ohio is situated in Jefferson, Harrison, and Belmont Counties, and the members of the Pittsburg Vein Operators' Association of Ohio are interested in mining coal in that district. The operators in that district in 1909 shipped over 400,000 tons of lake cargo coal over the railroad of the appellee to the lower lake port at Huron and trans-shipped the same by vessel to points in the Northwest (R., 18). This coal is shipped from the mines to Huron, where the railroad company has dock facilities and machinery and appliances for unloading coal into vessels during the season of navigation.

The coal when it leaves the mines is simply marked "Lake Coal" and consigned to the operator or to some office employe whose name is used as a mere matter of convenience for the purpose of designating a grade of coal (R., 62, 63, 65, 66). The operator notifies the railroad when a vessel will be at Huron to load so many tons of a particular grade of coal (R., 66, 80, 81). Whereupon, the railroad unloads such operator's coal into the hold of the vessel (R., 66) and trims or distributes the coal properly in the hold (R., 77), and makes out a cargo manifest and furnishes the shipper with a cargo statement showing the cargo weights, etc., from which the bill of lading is made out (R., 66, 76, 77). Trimming the coal in the hold of the vessel requires the railroad company to send its men into the hold of the vessel (R., 77, 78).

All coal shipped by the operators from the No. 8 district to the lake ports at the lake cargo rate remains on the cars until unloaded into a vessel (R., 77), unless it is diverted en route or at Huron before unloaded, in which case its is not treated as lake cargo coal and the lake cargo rate does not apply (R., 63). The lake cargo rate requires the shipper to furnish the vessel into which the coal is to be loaded by the rail carrier (R., 76). It does not apply to commercial coal consigned to Huron or to coal that has been diverted before or after reaching Huron (R., 63). The rate on lake cargo coal passing through the Huron gateway en route for the Northwest is less than the rate on commercial coal delivered at Huron. The reason for this is that the lake cargo rate is made on the basis of a through rate in order to enable the No. 8 lake coal to be marketed at Duluth and northwest delivery points (R., 76, 77).

The general plan with respect to handling lake cargo coal followed with only slight and immaterial deviations by all coal operators is best outlined in the testimony of Messrs. Roby

(R., 61, Osborne (R., 62, 63, 64), and Maurer (R., 65, 66, 67, 69, 70, 71, 72). The testimony of these witnesses shows that lake cargo coal forwarded through the Huron gateway is intended for a point or points beyond Huron and outside of the State, namely, to points in the Northwest at the head of the Great Lakes; that each operator estimates the amount of coal he expects to sell at the head of the lakes and usually before the opening of navigation arranges with various vessel companies for a supply of boats sufficient to transport the estimated tonnage; that the operator underestimating the amount of coal to be sold in the Norwest, must take the chance of making arrangements during shipping season for such additional tonnage; that sometimes the operator thinks better terms can be made with the boat owners if arrangements are not made until after navigation is opened, in which event vessels are chartered from time to time during the season of navigation; and that the operators engaged in lake cargo trade either own their own docks or control docks or have close relation with persons owning docks at the head of the lakes. The following testimony brings this out very clearly (substituting question and answer for the names of examiner and witness):

Testimony of Mr. Johnson (coal operator):
(Record 60.)

“Q. Taking the number eight coal and the Fairmont coal up the lakes to this dock in the northwest?

A. Yes, sir.

Q. Where is the dock of the Northwestern Fuel Company located?

A. Oh, they have docks at different places.

Q. Well, name the places?

A. Duluth, Green Bay—I hardly know where the docks are.

* * * * *

(Record, 61.)

Q. The Central Coal Company, The Northwest-

ern Fuel Company, whose docks are on Lake Superior or somewhere up in the northwest, and in addition to that, you probably will sell a little additional coal to stray purchasers?

A. Anybody that wants to buy it, yes, sir.

Q. That constitutes your lake coal trade for this season or will constitute it?

A. Yes, sir."

Testimony of Mr. Roby (coal operator):

(Record, 61.)

"Q. Do you ship coal to the northwest?

A. Do you mean lake coal?

Q. Yes.

(Record, 62.)

A. Last year we shipped about 130,000 tons.
* * * * *

Q. Does the C. Reiss Coal Company take all of your tonnage?

A. They took all the lake tonnage we sold last year.
* * * * *

Q. Where are his docks?

A. Some at Green Bay.

Q. Any at Duluth?

A. Yes."

Testimony of Mr. Osborne (coal operator):

(Record, 63.)

"Q. What point do you deliver your lake coal when consigned to the railroad trade?

A. To Depot Harbor.

Q. You have no dock there?

A. No.

Q. Your dock is located at what point?

A. At West Superior, that is, Duluth Harbor, you know.
* * * * *

(Record, 64.)

Q. Well, all of the coal that goes in there (lower lake port dock) that takes the lake rate goes to the northwest, doesn't it?

A. No, some of it goes to Detroit; some up along the river; some over into Canada—wherever we can get an order. Some of it we divert and we use locally.

Q. You pay the local rate if you divert it?

A. Yes, and take your demurrage charges, too."

Testimony of Mr. Maurer (coal operator):
(Record, 66.)

"Q. When you have gotten a boat to deliver a cargo of coal, you make a bill for that cargo, do you?

A. Do you want the steps as we go along, the steps we take?

Q. Just state the steps that you take.

A. When we secure a boat for loading a cargo of coal, the first step is to call up Mr. Titus, the assistant superintendent of The Wheeling & Lake Erie road, and notify him that on a certain day a certain boat will be at Huron to load with Glens Run coal, and simply request him to have the coal there to load the boat. That is all we have to do with the railroad company. Ordinarily we cover with the vessel people our contract tonnage. In other words, if we are figuring on shipping 150,000 tons of lake coal we will probably distribute that tonnage among three or four shipping concerns. For example, the United States Transportation Company, the Gilchrist Transportation Company or some other transportation company covering that entire tonnage at a stated rate of freight to the different parts where we expect to ship. Then we notify these companies, whichever one we may select that on a certain date we desire to load a cargo. They report to us the name of the vessel, if they have one. Immediately upon the receipt of that report we fill out what we call a charter confirmation, giving the capacity and name of the vessel, where to load, and to what destination she is to go, the rate of freight and any other information that may be necessary, what kind of a vessel, where the vessel is to report for fuel, and whatever instructions may be necessary with reference to the vessel.

* * * * *

(Record, 72.)

Q. * * * So that your company at the beginning of the season estimates the quantity of coal it wants to ship to the northwest ports or to your dock or to an independent dock?

A. Yes.

Q. And you proceed to start that amount of coal to the northwest; sometimes you do not sell it in advance; isn't that true?

A. Yes."

Testimony of Mr. Worthington (Receiver of complainant railroad):

(Record, 76.)

"Q. The rate f. o. b. vessel requires the shipper to furnish the vessel?

A. Yes, sir.

Q. And you are unable to load the coal into the vessel unless the vessel owner consents?

A. Exactly.

Q. Does it require the shipper to furnish a vessel any more than it does anybody else?

A. It requires the shipper, because the shipper arranges with us to place the coal aboard the vessel. We would not take an order from the consignee. The shipper instructs us what boat he wants that coal put into.

Q. Would you ship that coal to Huron f. o. b. vessel without knowing that the shipper intended to furnish you a boat in which to load it?

A. No. The reason the rate is made ninety cents is because we understand that we are furnishing what is known as lake coal, and that must be loaded on board vessel as soon as the shipper instructs us what boat he wants the coal loaded into.

Q. For transportation to the northwest?

A. For transportation to the northwest.

* * * * *

(Record, 77.)

Q. I will repeat the question. Why is it your custom to have a lower rate on lake coal passing

through Huron gateway than it is on commercial coal delivered in Huron?

A. Simply because it is made on the basis of a through rate and to enable No. 8 lake coal to be marketed at Duluth and the northwest delivery points.

(Record, 81.)

Letter from M. A. Hanna & Co. (coal operators):

“Cleveland, O., June 18, 1909.

Mr. F. P. Barr, S. C. S.,

W. & L. E. R. R., City.

Dear Sir: We have sold a certain tonnage of No. 8 coal that is to go to Escanaba for the C. Reiss Coal Co. and they request that this coal be shipped to their own consignee and have selected the name, ‘F. I. Kennedy.’ They expect to float one cargo this month of between 7,800 and 9,000 tons, and we will commence shipment on this order about Tuesday or Wednesday next week. We give you this as a matter of information, so that when this coal is offered under the name of Kennedy, you will know for whom it is intended.

Yours very truly,

M. A. HANNA & CO.,

WPS-N.

(By W. P. Schaufele).

Copy to—

Mr. A. P. Titus, Asst. Supt.,
Canton, Ohio.”

Testimony of Mr. G. W. Ristine (traffic expert called by coal operators):

(Record, 59.)

“Q. Now, in considering this rate you have considered it, or you have considered the transportation of the coal from the Number Eight District through the Huron gateway as coal that is not destined for Huron, but for points beyond, have you not?

A. Sure.

Q. In other words, you have not treated this coal as local coal at Huron?

A. No. Local coal at Huron would be commercial coal."

Testimony of Mr. A. S. Dodge (traffic expert, called by coal operators):
(Record, 60.)

"Q. And, therefore, in your analysis and the conclusion which you have reached respecting this lake cargo rate you have treated the commerce as interstate commerce rather than state commerce?"

A. I could not lose sight of the fact that the ultimate destination of the coal was interstate."

II.

ARGUMENT.

(a)

THIS COURT DOES NOT HAVE JURISDICTION OF THIS CASE ON APPEAL.

In the brief filed on behalf of appellant in support of petition for allowance of a writ of certiorari counsel claim that appeal to the Circuit Court of Appeals was properly taken and admit the finality of that court's decision. Supplementing the position of counsel in that respect, we wish to call the court's attention to the fact that the Circuit Court of Appeals held with the appellant and against the appellee because it construed the bill of the receiver filed in the Circuit Court attacking the validity of the order as precluding jurisdiction upon the status of the property in the Federal Court and as ancillary to the original receivership suit. On this point the court say (R., 113):

" * * * It (the motion to dismiss filed by the appellee) is based upon the erroneous conception that the appellate jurisdiction of the case is the same as that applicable to cases of original bills. But this is the case of a bill which is ancillary to the original suit; and the jurisdiction of the Circuit Court to entertain it depended upon its jurisdiction in those suits. They were brought by the receiver

for the protection of the interests of the Railroad Company whose properties were in the hands of the court for administration. In such a case the court does not look either to the citizenship of the parties to the ancillary suit nor to any other peculiar matter affecting its jurisdiction. * * * It may be proper, though it is unnecessary, to say that even if this were an original bill, the claims made by it are not all of a character which require the appeal to be taken to the Supreme Court under the provisions of Section 5 of the Act creating the Court of Appeals. Some of the claims made are of that character, but one of them, the 3rd, at least, is not; and if it stood alone the appeal must have been taken in the Circuit Court of Appeals * * * .”

We do not wish to question the conclusion reached by the Circuit Court of Appeals or the interpretation placed upon the language of that portion of the bill invoking the jurisdiction of the Circuit Court. Nor do we understand that the appellant wishes to do so. Under such circumstances it would seem that this court is justified in adopting the conclusions reached by the Circuit Court of Appeals; and inasmuch as appellate jurisdiction in the Federal Court in cases of this kind is final, both appeals that have been taken to this court should be dismissed. If the court adopts this view, it remains to consider the petition for a writ of certiorari asked for by appellee.

(b)

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

For a detailed statement of the grounds relied upon in support of opposition to the granting of the writ of certiorari, we beg leave to refer the court to brief heretofore filed on behalf of respondent upon the petition for allowance of writ of certiorari. Briefly stated, the reasons why the writ should not be granted are:

(a) The record does not disclose any question of

law in regard to which there is not a uniformity of ruling.

(b) The record shows that the determination of the controversy depended upon the determination of an issue of fact, that is, the circumstances and conditions surrounding and the arrangement under which lake cargo coal is transported.

(c) It is the well-settled rule of this court that the concurrent decisions of two subordinate courts upon questions of fact will be followed unless shown to be erroneous.

(d) The Circuit Court and the Circuit Court of Appeals reached the same conclusion as to the probative effect of the testimony offered in the case, to-wit, that the rate applied to coal moving from a point in Ohio to a point outside the State and there is no showing that the conclusion so reached is erroneous.

(e) The case does not fall within the category of questions of such gravity and general importance as to require the review of conclusions of the Circuit Court of Appeals in reference to them. Nor will the granting of the writ prevent long and expensive litigation and "conduce greatly to the general commercial stability in the coal trade," inasmuch as a decision of the question presented in the record will not finally determine the controversy, as the order of the Railroad Commission was attacked upon other grounds that have not as yet been disposed of; and, furthermore, there is now pending before the Interstate Commerce Commission four cases involving the readjustment of the lake cargo rates from the states of West Virginia, Pennsylvania and Ohio to lower Lake Erie ports for trans-shipment via vessel to points at the head of the Great Lakes, and the presumption is that the Commission will in the near future adjust the rates and fix the differentials between the districts, and that such action is likely to produce that general commercial stability desired by the real party in interest in this

controversy, namely, the coal operators in the No. 8 Ohio coal district at a much earlier date than can be obtained at the end of long litigation in this case.

The petition for writ of certiorari should therefore be denied.

(c)

THE ORDER OF THE RAILROAD COMMISSION OF OHIO IS VOID.

Proceeding to a discussion of the case upon its merits, we submit that the decree of the Circuit Court and of the Circuit Court of Appeals should be sustained for the following reasons:

(1.)

THE FINDINGS OF THE CIRCUIT COURT AND CIRCUIT COURT OF APPEALS SHOULD BE FOLLOWED.

As stated above, the Circuit Court of Appeals reached the same conclusion as the Circuit Court respecting the probative effect of the testimony offered by the Receiver of the Railroad and found with the complainant on the issues joined with reference to the character of such commerce and that the rate in controversy applied only to coal transported from a point in the State of Ohio, to-wit, the No. 8 District to a point outside the State. It is a well-settled rule of this court that the concurrent decisions of two subordinate courts upon questions of fact will be followed unless shown to be erroneous.

The Carib Prince, 170 U. S., 655.

Court say, page 658:

"The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. *Compania La Flecha v. Brauer*, 168 U. S., 104, and cases there cited; *Stuart v. Hayden*, 169 U. S., 1; *Baker v. Cummings*, 169 U. S., 189, 198.

As, after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the *Carib Prince* was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to."

Adopting the foregoing rule and assuming the facts to be as found by the lower courts, and as stated above, no question is presented to this Court for consideration, because neither party challenges the statement that if the transportation involved in this controversy is transportation from a point in one state to a point outside the state the power of regulation pertaining to that transportation is vested in the Federal Government.

(2.)

LAKE CARGO COAL IS INTERSTATE COMMERCE.

The appellee contends that the transportation of lake cargo coal from the No. 8 district is interstate commerce, for the following reasons:

(1) The shipper engaging in the lake cargo trade intends to engage in interstate commerce.

(2) The shipper, pursuant to such intention, actually engages in such commerce and contracts with the vessel owner for the water carriage of such interstate transportation in order to provide boats into which the railroad company may load lake cargo coal. The Railroad Company cannot complete performance of its obligation until the shipper has provided the vessel.

(3) The railroad company knows the intention of the shipper and makes a rate of 90 cents f. o. b. vessels, which is ten cents less than the rate on commercial coal to the same point in consideration of the fact that Huron is not the destination of the coal.

(4) The lake cargo rate f. o. b. vessels is only applicable to coal shipped up the lakes beyond the state line;

and in this sense is a "proportional rate" constructed with reference to the total through carrying charges (via rail and vessel) from the mines to the head of the lakes.

(5) The interstate journey has commenced when the coal operator turns the coal over to the railroad at the mines, marked "Lake Coal."

(6) The coal when it leaves the mine is continuously in the possession of the carrier (rail and vessel) until it reaches its destination at the head of the Great Lakes.

(7) The journey from the mines to the head of the lakes is continuous (and intended by the railroad company, shipper and vessel owner to be so), broken only by the necessary transfer from cars to vessel. The vessel's duty attaches at the very moment the railroad company's has ended.

(8) After the coal leaves the mine there is no interruption of transit, except delay at Huron awaiting arrival of boat, but during all of such delay the coal is in the possession of the railroad company and the railroad company has not fully completed its contract. Immediately upon the completion of the railroad company's obligation respecting the lake cargo traffic, to-wit, *loading into vessel*, the vessel carrier proceeds on its way.

(9) The transportation of lake cargo coal from the No. 8 district to the head of the lakes is one entire transaction, participated in by the shipper, the railroad company and the vessel carrier under common arrangement whereby each party performs his respective duty, to-wit: the shipper furnishes the coal and arranges for the vessel transportation; the railroad company carries the coal from the No. 8 district to Huron by rail and unloads it into the vessel engaged by the shipper to transport the coal up the Great Lakes; the vessel performs the vessel carriage and consents to the performance by the railroad company of the unloading service into the hold of the vessel, which is essentially a duty that must be performed

in connection with the vessel carriage. Each party in performing its respective duty acts as a link in the interstate transportation intended by all to be carried on and each link is necessary and essential to the accomplishment of the common purpose of the parties, namely, the transportation of coal from the No. 8 district in Ohio to the head of the Great Lakes.

(10) The lake cargo coal rate includes two services, to-wit:

(1) Rail carriage from the No. 8 district to Huron; and (2) unloading service, namely, unloading coal from cars to the hold of the vessel engaged to transport the coal immediately to points beyond the State. The loading (into vessel) service is essentially a part of the transportation service to be rendered by the vessel unless the vessel owner and the shipper arrange to have it performed by others. The vessel service is clearly interstate, and therefore the loading (into vessel) service is interstate. The State Commission has no power to charge a portion of the 90-cent rate f. o. b. vessel to such loading service and then proceed to regulate the remaining portion on the theory that such remaining portion applies to a rail carriage which should be treated as intrastate in character.

(11) The railroad company knows (1) *that the coal is shipped from the lower lake port to the upper lake port by vessel*; (2) *that the shipper makes his own arrangement with the vessel carrier as to the terms and conditions (in other words, the rate) upon which the carrier will perform the rail portion of the journey, that is, will transport the coal from the lower lake port to the upper lake port*; (3) *that it is necessary for the shipper or some one in his behalf to make some arrangement with the vessel carrier in order that the shipper may perform his obligation with the railroad company, namely, to furnish a boat into which the railroad company may un-*

load the coal; and (4) that the shipper's implied agreement to do so and to forward the coal to upper lake ports is a condition precedent to the shipper's right to the benefit of the lake cargo rate.

In this connection attention is called to the four cases pending before the Interstate Commerce Commission involving the readjustment of the lake cargo rate from the states of West Virginia, Pennsylvania and Ohio to lower Lake Erie ports for trans-shipment via vessel to points at the head of the Great Lakes, contained in an exhibit heretofore filed in this cause. The complainant in one of the cases is the Pittsburg Vein Operators' Association of Ohio, the members of which own and operate mines in the No. 8 District of Ohio, being the same complainant that attacked the reasonableness of the rate involved in this controversy when the matter was pending before the Railroad Commission of Ohio. In the complaint filed by the Pittsburg Vein Operators' Association are found allegations substantiating the claim of the appellee herein respecting the character of the commerce. In this respect attention is called to the following allegations:

“* * * said Receiver has been, and now is, engaged in the carriage and transportation of coal from the No. 8 field * * * in the State of Ohio, to certain ports on the southern shore of Lake Erie, * * * both located within the State of Ohio, which said coal at said ports * * * has been and now is transferred to lake vessels, and has been and now is carried on said lake vessels to points in other States * * *; that said coal so shipped from said mines to said lower lake ports for trans-shipment by water * * * is and for a long time has been transported by said defendants and each of them, under a contract of carriage, by the terms of which said defendants * * * agree to transport said coal in ear load lots from said mines to said lower lake ports * * *, and there unload the same upon vessels to be supplied * * * by said shippers * * *, and * * *

* it being further understood that said shippers will furnish lake vessels for the transportation of said coal by water to points in other States * * *.”
(See Article 2 of the petition.)

And also the following:

“That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States * * * with said coal so shipped and transported from said West Virginia and said Kentucky coal fields, and competes in said northwestern coal markets with said West Virginia and Kentucky coal; * * *.” (See Article 7 of said complaint.)

And also the following:

“* * * said defendant Reeve, * * * have been and now are giving to the West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; * * *.” (See Article 9 of said complaint.)

3.

CASES SUPPORTING POSITION OF APPELLEE.

The foregoing reasons, insofar as they contain statements of facts, we submit, are abundantly supported either by the admissions of the parties as contained in the pleadings or by the testimony of the witnesses, and insofar as they contain legal conclusions, by the following authorities:

Southern Pacific Terminal Company vs. Interstate Commerce Commission and Young, 219 U. S., 498.
Syllabus:

* * * * *

“Goods actually destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State or are delivered to a carrier for transportation, *Coe v. Errol*, 116 U. S., 577; this is the same whether the goods are shipped on through bills of lading or on an initial bill only

to the terminal within the same State where they are to be delivered to a carrier for the foreign destination."

This case involved the validity of an order of the Interstate Commerce Commission requiring the carriers to desist from giving undue preference to a certain shipper of cotton seed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cotton seed cake and meal over the wharves, docks and piers of the carrier while at the same time exacting such charges from other shippers of cotton seed cake and meal. It appeared that the carrier had leased to the shipper a portion of the carrier's wharf facilities at Galveston; that the business of the shipper was that of buying and selling and converting cotton seed cake and meal for his own account, shipping it to himself by carloads to the wharf in controversy, there grinding it into meal, sacking it and loading it into steamships berthed at the pier. The carriers and shipper enjoying the lease resisted the order of the Commission upon several grounds, among others that the Commission by its order assumed to control intrastate commerce not subject to the Act to Regulate Commerce. The court sustained the validity of the Commission's order and in the opinion say, page 526:

"This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is 'a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export.' But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported, from that so purchased and manufactured on the wharves of the Terminal Company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water car-

riage. It is manifest, as we have said, that to make the wharves manufacturing or concentrating points for one shipper and not for all is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. *It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose.* The case, therefore, comes under *Coe v. Errol*, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation.' In *G., C. & S. F. Ry. Co. v. State of Texas*, 204 U. S., 403, the facts are different and the case is not apposite." (Italics are ours.)

Texas & Pac. Ry. Co. et al. vs. Railroad Commission of Louisiana, 183 Fed. Rep., 1005.

Syllabus:

"Complainant railroad companies filed with the Interstate Commerce Commission a schedule of rates from points in Louisiana to New Orleans for export shipments. The Railroad Commission of Louisiana had also fixed a schedule of different and lower rates on local shipments between the same points. It also

by an order allowed 4 days free storage on local shipments and 20 days on shipments intended for export, in which order the railroads acquiesced, and also delivered shipments for export at ship's side free of charge for switching. Certain shipments were delivered to complainants from points in Louisiana for carriage to New Orleans on bills of lading of substantially the local form, and on their arrival the consignees demanded and received the free storage accorded export shipments and free delivery to the vessel carrier; the shipments being delivered by complainants directly from their cars to such carrier, as was intended by the owner when it was shipped. *Held that, notwithstanding the use of the local bills of lading, the contract between the shippers and complainants was one for an export shipment, over which the Louisiana Railroad Commission had no jurisdiction, and that complainants were entitled, and even required, to charge the rates on such shipments fixed by their schedules filed with the Interstate Commerce Commission.*" (Italics are ours.)

Court say, page 1008:

"* * * It is manifestly of great benefit to the exporter to be allowed to accumulate freight at a seaport, and to hold it for a reasonable time without additional cost. Ocean rates vary according to the supply and demand, and these privileges advantage the exporter in securing favorable rates for the water carriage. I can conceive of no reason why the railroad and shipper, instead of getting out a through bill of lading to the foreign port, should not agree to apply the export rate, with its incidental privileges, to all shipments which are, in reality, intended for export, and to allow the shipper to select the ocean carrier, provided, of course, no fraud or violation of law or public policy is contemplated. If they can do so by express agreement, they can certainly do so by tacit understanding or acquiescence.

"In the instant case both parties have treated the shipments as export shipments, and that is what they in fact were. It is not even hinted there

was any evasion of law or violation of public policy by their so doing. Therefore I do not think the form of the bill of lading should absolutely fix the status of the freight, as I consider the contract of carriage should be held to be what the parties really intended it to be."

Cutting vs. Florida Ry. & Navigation Co., 46 Fed., 641:

Syllabus:

"Orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point for re-shipment, who immediately forwarded them to their destination in another state. *Held*, that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission."

The Daniel Ball, 10 Wall., 557, at 564:

"There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but *inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in com-*

merce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transaction, it is subject to the regulation of Congress." (Italics are ours.)

General Oil Co. vs. Crain, Inspector of Coal Oil, 209 U. S., 211.

Court say, page 228:

"The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol*, 116 U. S., 517, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston*, 114 U. S., 622, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. *State v. Engle*, 5 Vroom (N. J.), 435; *State v. Carrigan*, 10 Vroom (N. J.), 35; *The Daniel Ball*, 10 Wall., 557.

In *Pittsburg Coal Co. v. Bates*, 156 U. S., 577, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the State of Louisiana.

In *Diamond Match Co. v. Ontonagon*, 188 U. S., 82, logs in transit to a point without the state were held subject to taxation under a statute of the state where they would 'naturally leave the state in the ordinary course of transit.'

In *Kelley v. Rhoads*, 188 U. S., 1, a flock of sheep driven from a point in Utah, across Wyoming to a point in Nebraska for the purpose of shipment by rail from the latter point was held to be property engaged in interstate commerce and exempt from taxation by Wyoming under the statute taxing all live stock brought into the state 'for the purpose of being grazed.' There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases expressed in the following passage: 'The substance of these cases is that while property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment. Property, therefore, at an intermediate point between the *place of shipment and ultimate destination may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.*

In *State v. Engle, Receiver, etc.*, 5 Vroom (N. J.), 425, 435, coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale, it was held that the property was not subject to taxation in New Jersey. The court said: 'Delay within the state, which is no longer than is necessary for the convenience of trans-shipment for its transportation to its destination, will not make it property within the state for the purpose of taxation.' See also in *State v. Carrigan*, 10 Vroom (N. J.), 36, where coal also shipped from Pennsylvania to a port in New Jersey and remaining there no longer than was necessary

to obtain vessels to transport it to other places was held to be in course of transportation and not subject to the taxing power of the State. In Burlington Lumber Co. v. Willets, 118 Ill., 559, the principle was recognized that property in transitu was not subject to the taxing power of a State, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi River, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was 'kept at New Boston on account of the profit of the owners to keep it there; and further, that the company was engaged in business in the State beneficial to itself, and its property was so located as to claim the protection of the laws of the State and hence was liable to taxation.

Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State v. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage." (Italics ours.)

Justice Moody, in the dissenting opinion, uses the following language, at page 235:

"The case of American Steel & Wire Co. v. Speed, 192 U. S., 500, holds that articles before they have ceased to be the subjects of interstate commerce may still be reached by the taxing power of the State. Accordingly it was held that the property of a citi-

zen of another State which had been brought into the State of Tennessee, placed in a warehouse for sale, and from there sold to persons within as well as without the State, was subject to a state tax. It was observed in the opinion in that case that the property had come to rest in the State and was enjoying the protection of its laws. But the case at bar, so far as it concerns the oil in tank No. 1, to which I confine my observations, is sharply distinguished from that case. * * * It was in Tennessee only momentarily ('a few days'), for the purpose of repacking and reshipping it, and for no other purpose whatever. The delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. It does not seem to me important, if such be the case, that it would begin the remainder of its interstate journey under a new contract of shipment."

* * * * *

"I conclude that the oil in question was actually in the course of transportation between the States, was delayed in the State of Tennessee only for the purpose of conveniently continuing that transportation, and was, therefore, protected from state taxation by the commerce clause of the Constitution. *Coe v. Errol*, 116 U. S., 517, 525; *Kelley v. Rhoads*, 188 U. S., 1. Cases of taxation upon property before it has entered the channels of interstate transportation, or after the transportation has finally ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of property of the State, and in the latter class because it has come to rest as a part of the mass of the property of the State. Between these two points of time it is exempt from the taxing power of the State. In every case where the tax has been sustained there were facts present regarded as essential by the court, which are absent here. The property had either not begun its interstate journey, as in *Coe v. Errol*, *ub. sup.*, and *Diamond Match Co. v. Outonagon*, 188 U. S., 82, or it had ended that journey and was held for sale in

common with other property in the State, as in *Brown vs. Houston*, 114 U. S., 622; *Pittsburg Coal Co. v. Bates*, 156 U. S., 577, and *American Steel & Wire Co., v. Speed*, *ub. sup.*”

J. Rosenbaum Grain Co. vs. C., R. I. & T. Ry. Co., et al., 130 Fed., 46. (Circuit Court, Texas.)

Syllabus:

“A state railroad commission is without power to require a railroad company to cancel and abolish ‘proportional tariffs’ which apply only to interstate or foreign shipments, and which were adopted with the approval of the Interstate Commerce Commission, to prohibit the company from permitting export shipments of grain to be stopped in transit within the state for cleaning, grading, etc., or by similar orders to attempt to regulate interstate or foreign commerce.”

Court say, page 47:

“The so-called ‘proportional tariffs’ on grain products, which the railroad company is required to cancel, are defined by the bill of complaint to be a collection of freight rates which apply upon interstate shipments from certain given points to certain other given points, when the commodities shipped originate beyond the place of shipping, or their ultimate destination is beyond the point to which the proportional rates apply. The ‘proportional tariffs’ in effect with the Chicago, Rock Island & Texas Railroad Company are effective with all other roads doing business in the State of Texas for like service. So far as this action is concerned, they are shown to be tariffs applying wholly to interstate business, and only to affect commerce between the states. They are subject to regulation by the Interstate Commerce Commission, and have been published and scheduled in accordance with the interstate commerce act, and approved of and acquiesced in by the Interstate Commerce Commission and all of the different roads on which they are effective. The complainant, the J. Rosenbaum Grain Company, a corporation organized under the laws of Illinois, and a citizen and res-

ident of that state, has invested a large sum of money in a grain elevator at Fort Worth, the southern terminus of the Chicago, Rock Island & Texas Railroad. It is largely engaged in the business of buying and selling grain for domestic uses and purposes and for export to foreign countries. It purchases grain in that region of the country north of Texas and yet tributary to the Gulf of Mexico. Having erected an elevator at the southern terminus of what is known as the 'Rock Island System,' it makes large purchases of grain in the country served by that system, and consigns it for shipment through Fort Worth when it is meant for export by way of the Gulf of Mexico. The right of stoppage in transitu is exercised at Fort Worth, and the grain is put through the elevator for the purposes of cleaning, clipping, grading assorting sacking, and otherwise preparing it for continued transportation. On shipments of grain where the complainant can take advantage of the 'proportional tariffs,' this is done. Complainant has large contracts on hand for the purchase and shipment of export grain. Owning the grain elevator at Fort Worth, it has made its arrangements to do business along the line of the Chicago, Rock Island & Texas Railroad and its northern connection, the Chicago, Rock Island & Pacific Railroad. With the 'proportional tariffs' canceled as required by the order, the complainant would not be able to comply with its contracts for the purchase and shipment of grain, by reason of the lower and 'proportional tariffs' being in effect on other railroads in favor of its competitors. The usefulness of its grain elevator at Ft. Worth for some of the most important purposes for which it was erected would be entirely destroyed. In passing this order, the Railroad Commission of Texas lays its hand upon interstate commerce, and seeks to control and regulate the same, notwithstanding the Interstate Commerce Commission is given and has exercised authority over these matters in accordance with the provisions of the interstate commerce act. Section 8 of Article 1 of the Constitution of the United States provides, among other things, that

the Congress shall have power to regulate commerce with foreign nations and among the several states. Ever since the decision of Chief Justice Marshall in the case of *Gibbons v. Ogden*, 9 Wheat., 1 6. L. Ed., 23, it has been the settled law that the power of Congress to legislate regarding and to regulate interstate commerce and commerce with foreign nations is exclusive, and all state legislation regulating such commerce is unconstitutional. Unquestionably this paragraph of the order of the Railroad Commission is illegal and void."

United States vs. Colorado & N. W. R. Co., 157 Fed., 321.

(Circuit Court of Appeals, Nov. 25, 1907.)

Court says, page 323:

"Importation into one state from another is the indispensable element, the test, of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed, and they there mingle with and become a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destinations in the other, and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce. *Rhodes v. Iowa*, 170 U. S., 412, 418, 419, 426, 18 Sup. Ct., 664, 42 L. Ed., 1088; *Kelley v. Rhoads*, 188 U. S., 1, 23 Sup. Ct., 259, 47 L. Ed., 359; *Houston Direct Nav. Co. v. Ins. Co. of North America*, 89 Tex., 1, 32 S. W., 889, 891, 30 L. R. A., 713, 59 Am. St. Rep., 17; *Leisy v. Hardin*, 135 U. S., 100, 10 Sup. Ct., 681, 34 L. Ed., 128; *Lyng v. Michigan*, 135 U. S., 161, 10 Sup. Ct., 725, 34 L. E., 150; *Caldwell v. North Carolina*, 187 U. S., 622, 631, 632, 23 Sup. Ct., 229, 47 L. Ed., 336.

There is nothing in conflict with this proposition in *Gulf, Colorado & S. F. Ry. Co. v. Texas*, 204 U. S., 403, 27 Sup. Ct., 360, 51 L. Ed., 540, because in that case the prescribed destination of the interstate shipment, whose origin was in South Dakota, was Texarkana, Tex. The assignee of the owner of the property who had shipped it to Texarkana rebilled the shipment from Texarkana, to Goldthwaite, in that state, and the Supreme Court held that the contract and carriage from Texarkana to Goldthwaite were intrastate and not interstate. In the case at bar the consignors shipped the goods to their prescribed destinations in Colorado when they started them from Kansas City and Omaha, respectively, and they never rebilled nor changed the destinations. The goods went in continuous passages from the origins of their transportation in eastern states to their final destinations upon the line of the Northwestern Company in Colorado. The rebilling practiced by the railroad companies without any new consents or contracts with the owners could not destroy or affect the interstate character of the shipments or of the transportation. The Northwestern Company was a common carrier; it transported from Boulder, Colorado, to their prescribed destinations in that state, articles of interstate commerce consigned from cities in Missouri and Nebraska, respectively, upon continuous passages, to their designated destinations in Colorado. Each of these transportations from the respective points in Missouri and Nebraska to the places of consignment of the goods in Colorado was a single interstate carriage and transaction, and the Northwestern company, by reason of its transportation of these and like shipments through a part of their interstate carriage, necessarily became a 'common carrier engaged in interstate commerce by railroads,' and thus fell within the literal terms and the ordinary meaning of the provisions of the safety appliance acts, which declare that it shall be unlawful for 'any common carrier engaged in interstate commerce by railroads to haul cars used in moving interstate traffic unequipped with automatic coup-

lers.' Counsel for the company contend that this statute should be construed to except companies independently participating in such transportation. But construction and interpretation have no place or function where the terms of a statute are clear and certain, and its meaning is plain."

Ex Parte Koehler, Receiver, etc., 30 Fed., 867.

Court say, page 869:

"There is no doubt that this railway and these steamers are engaged in interstate commerce in the carriage of these goods under the circumstances stated. Any carriage of goods which crosses a state line is interstate commerce; and the fact that transportation from one state to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the state line, does not affect the character of the transaction in this respect. For, whenever an article destined to a place without the state is shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them may pass from one state to the other, are subject, as instruments of such commerce, to national legislation and control. *The Daniel Ball*, 10 Wall., 564; *Hall v. DeCuir*, 95 U. S., 485; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S., 572, 7 Sup. Ct. Rep., 4; *Ex parte Koehler*, 25 Fed., Rep., 76."

Fargo vs. Michigan, 121 U. S., 230.

Court say, page 238:

"Freight carried from a point without the state to some point within the state of Michigan as the end of its voyage, and freight carried from some point within that state to other states, is as much commerce among the states as that which passes entirely through the state from its point of original shipment to its destination."

Houston Direct Navigation Co. vs. Ins. Co. of North America, 30 L. R. A., 713:

"The questions to be determined are, did the

cotton in question when delivered to the navigation company start on its journey to a point outside of the state of Texas? Was its destination at that time fixed and determined upon, and was the carriage from Houston to Galveston a part of the voyage, which was to be continuous? The facts in this case show that the owners of the cotton lived in Liverpool, and the cotton itself was by their agents put in transportation by delivery to the navigation company, to be carried by it to the city of Galveston, and there delivered to the Mallory Line, by which it was to be transported to New York, and thence by connecting line of steamers to the city of Liverpool. The bill of lading upon its face showed that the navigation company was to deliver the cotton to the Mallory line at Galveston, at which time the liability of the Mallory line should attach. There can be no doubt that the destination of the cotton, at the time of its delivery to the navigation company, was fixed and determined, and the point at which it was destined for final delivery was beyond the limits of this state. It is equally clear, from the bill of lading and other testimony, that a continuous voyage was contemplated, and the trip between Houston and Galveston was simply a part of that voyage. Upon the state of facts the cotton would undoubtedly come within the rule laid down in the cases cited above, and would be classed as interstate commerce. But the evidence likewise shows that the Houston Direct Navigation Company gave a bill of lading to Galveston only, and not a through bill of lading to cover the entire route, and the charges of freight to Galveston and wharfage at that place were paid at the time that the cotton was delivered. Do these facts change the rule of law applicable to the case, and constitute this a local shipment as distinguished from interstate or foreign commerce?" (Italics ours.)

After discussing various cases, the court concludes as follows:

"We conclude from the authorities and the facts in this case that the transportation of the cotton by

the Direct Navigation Company from Houston to Galveston was interstate or foreign commerce, and that its liability for the loss must be determined by the rules of law established by Congress, in so far as such rules have been prescribed, unless the provision of the charter before quoted operates to subject the corporation in the carriage of interstate commerce to the statutes of the state instead of the laws of Congress. * * * It follows from what we have said that in our opinion the liability of the Navigation Company in this case is to be determined under the laws of Congress upon the subject, or the common law, in so far as Congress has made no provision therefor, and not by the statutes of the state of Texas, which forbid the carrier to limit its liability as at common law."

State vs. Gulf, C. & S. F. Ry. Co., 44 S. W., 542 (Texas, 1898):

"A firm in Kansas City wanted to ship some sheep from San Angelo, Texas, to Kansas City. Instead of shipping them straight through they shipped them first to Fort Worth under the lower rates fixed by the State Railroad Commission and there unloaded them. Then they reloaded them on another road to complete the haul from Fort Worth to Kansas City. The court held that the shipment from San Angelo to Fort Worth was an interstate shipment and that the state therefore had no right to fix the rates for it."

State vs. Southern Kan. Ry. Co. of Texas, 49 S. W., 252:

"Where a carrier transports freight from a point in another state under a contract *for its delivery f. o. b. cars of a Texas railway*, to be shipped to another point in Texas, the latter carrier is engaged in interstate commerce and not subject to the State Railroad Commission regulations." (Italics ours.)

Gulf, C. & S. F. Ry. Co. vs. Fort Grain Co., 72 S. W., 419 (Texas 1903):

"If the final destination of goods shipped from a point without the state of Texas is a point within that state the shipment is an interstate one and not

subject to the commission rates of Texas, *though not made on a through bill of lading.*" (Italics ours.)

Porter vs. St. Louis Southeastern Ry. Co., 95 S. W., 453 (Ark. 1906):

"Shipper bought a carload of lime at Erin, Tennessee. He wished to transport it to Stuttgart, Arkansas. He shipped it to Brinkley, Arkansas, *and there reshipped it to Stuttgart, Arkansas.* Held, that it was an interstate shipment and that he must pay the interstate rate between Brinkley and Stuttgart." (Italics ours.)

Beale on Railroad Rate Regulation, Sec. 898:

"If the transporting of goods or passengers to an ultimate destination in another state has begun, interstate commerce has begun, and no device to break up the transit into intrastate portions will affect its real nature. So where transportation of goods destined for a point without the state has been actually begun, temporary stoppage within the state, without the intention of abandoning the original movement (which movement is ultimately completed), will not deprive the transportation of the character of interstate commerce. *Delaware & H. Co. vs. Com.* (Pa.), 2 Int. Com. Rep., 222 (1888). And so if the goods are first billed to a point in the state of shipment, and at that point are rebilled to their ultimate destination in another state, without breaking of bulk, the whole constitutes a single carriage."

Mattingly vs. Pennsylvania Co., 3 I. C. C. R., 592:

Commission says, page 608:

"Carriage does not cease to be continuous by incidental halts for inspection, customs purposes or transfers from one carrier to another. When a shipment is continuous the carriage is deemed continuous for the purpose of this Act. * * *."

Page 609:

"Only commerce not national in its character—that is purely internal commerce of a state—is that subject to rules prescribed by the national authority.
* * * Every common carrier, whether by railroad

or conjointly by railroad and water, engaged in the transportation of interstate or foreign commerce for a continuous carriage or shipment is declared to be subject to the Act. * * * What is meant by transportation wholly within one state? The answer seems plain. It is evidently the transportation that is an element of the commerce not subject to the jurisdiction of Congress. This commerce the court say is only that which is confined exclusively within the jurisdiction and territory of a state and does not affect other nations or states or the Indian tribes—that is to say, the purely internal commerce of a state; the commerce which is wholly confined within the limits of a state. Under this principle transportation wholly within one state, to which the Act does not apply, must originate and end in the same state. If the transportation be part of a voyage from one state to another, or of a shipment to or from a foreign country, it is interstate or foreign commerce and subject to the Act.”

Beale and Wyman on Railroad Rate Regulation, Sec. 896:

“The purely internal commerce of a state is that which is confined within its limits, which originates and ends within the state. * * * The question whether a certain transaction constitutes interstate commerce must be determined, on the principles heretofore discussed, what the real transit is, and whether that traffic is or is not between separate states. Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.”

Massillon Coal Mining Co. vs. Railroad Commission of Ohio, et al. In the United States Circuit Court (unreported case), So. Dist., E. D.

The Railroad Commission of Ohio, in the matter pending before it in which the Haring-Wilson Company and the South Massillon Mining Company complained of the Wheeling & Lake Erie Railroad Company because of an alleged discrimination in the distribution of cars among coal operators on its railroad, made and promulgated the following order:

“That in making future allotments and distribution of coal cars by defendant to the shippers of coal having mines on its line of railroad there will be and hereby is established the regulation and practice of taking into account as available equipment all so-called private cars, foreign cars and system cars as a substitute for the regulation and practice of only taking into account for such allotments and distribution so-called system cars, and in the distribution of private cars, foreign cars and system cars each coal shipper located on the defendant's line of road shall receive his pro rata share thereof in proportion to his immediate requirements.”

The Massillon Coal Mining Company and The Wheeling & Lake Erie Coal Mining Company, operators on complainant's railroad, thereupon filed a bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, seeking to restrain the Railroad Commission and The Wheeling & Lake Erie Railroad Company from putting into effect the order aforesaid, claiming that the said order was void because it undertook to regulate the distribution of fifteen hundred cars in use on The Wheeling & Lake Erie Railroad Company's line of railroad and in which said cars the complainants claimed a leasehold interest and which said cars were used by the said complainants in the lake-cargo coal trade engaged in by the said complainants, and which said lake-cargo coal, as claimed by the complainants, constituted interstate commerce over which the Railroad Commission had no jurisdiction.

Upon motion of complainants for a temporary restraining order, the court issued an order restraining the Haring-Wilson Company and the South Massillon Coal Mining Company from commencing any action against the Wheeling & Lake Erie Railroad Company to enforce the rule above referred to. The Railroad Commission of Ohio, through the Attorney General of the State, stipulated in open court that it would not take any action to

enforce the said order, and such stipulation was made a part of said temporary restraining order issued at the time. Subsequently the Railroad Commission of Ohio instituted a proceeding before the Interstate Commerce Commission, asking that body to promulgate the same rule above referred to and to make the same applicable to cars engaged in interstate commerce. Later on the Railroad Commission of Ohio revoked the order and the United States Circuit Court dissolved the temporary restraining order and dismissed the action. In this case the jurisdiction of the Federal Court was founded squarely upon the proposition that the 1500 coal cars which the complainants claimed the right to have devoted exclusively to their uses were used in carrying on the interstate commerce of the complainants, to wit: the carrying of lake-cargo trade, and which were needed by the complainants in carrying out large contracts in such trade. *The Federal Court, in granting the said injunction, necessarily had to hold that cars engaged in hauling lake-cargo coal actually at time of movement were engaged in interstate commerce, and the Railroad Commission, in failing to file a motion to dissolve the temporary injunction and in presenting the matter to the Interstate Commerce Commission, recognized the correctness of the position taken by the Federal Court in granting the preliminary injunction.*

(4)

CONGRESS HAS EXCLUSIVE JURISDICTION OVER INTERSTATE RATES.

The lake-cargo rate applies to a service that is either wholly interstate or in part interstate, and the regulation of it falls within the exclusive jurisdiction of congress, because rate-making is national in its character and admits of only one uniform system.

Wabash Ry. Co. vs. Illinois, 118 U. S., 557, at 577:

“Of the justice or propriety of the principle

which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

Kaiser vs. Ill. Cent. R. R. Co., 18 Fed., 151, at 153:

"(1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one state to a place in another is 'commerce among the states.' (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one state to places in other states is a regulation of commerce among the states. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation. (7) *The state cannot*

adopt any regulation which does or may operate injuriously upon the commerce of other states." (Italics ours.)

Article by William Howland, 4 Harvard Law Review, 221, at 223:

"The commercial powers of Congress are not in terms exclusive; but it is now settled that they are exclusive where the subject-matter is national in character and admits of and requires a uniform rule. Accordingly, it is held, for example, that a state cannot regulate the rates of transportation on goods destined to another state, impose a tax on goods which are being transported into or through the state or prescribe the accommodations to be furnished passengers coming into or going out of the state."

Phila. S. & S. Co. vs. Pennsylvania, 122 U. S., 326, at 338:

"If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freight received for such transportation must equally belong to that power; and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself."

See also the following cases:

Cooley vs. Board of Wardens, etc., 12 How., 299-319.

Covington, etc., Bridge Co. vs. Kentucky, 154 U. S., 204, at 219.

Fargo vs. Michigan, 121 U. S., 230, at 247.

Dow vs. Beidelman, 125 U. S., 680, at 689.

Article of William F. Dana, 9 Har. Law Review, 324, at 336.

Interstate Commerce Commission vs. Ry. Co., 167 U. S., 479.

Louisville & Nashville, etc., vs. Eubank, 184 U. S., 27.

U. S. vs. Colorado R. R. Co., 157 U. S., 321.
Beale and Wyman on R. R. Rate Regulation, Secs.
 1336 to 1339.

Article of William F. Dana, 9 Harvard Law Review, 324:

After examining the cases on State Regulation of Interstate Rates of Fare and Freight, he says (page 336):

"It may, therefore, be taken as well settled law today that the states have no power of regulation over the charges for transportation of interstate traffic whether of passengers or freight."

Corington, etc., Bridge Co. vs. Kentucky, 154 U. S., 204, at 219:

"A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State."

The argument of counsel for appellant, found on pages 82 to 100, inclusive, of brief, apparently proceeds upon the assumption that the state has authority to regulate the transportation under consideration, if it appears that the Act to Regulate Commerce has failed to give the Interstate Commerce Commission authority over such rate. The fallacy of this argument is two-fold.

First, it overlooks the fact that the Federal Government has *exclusive jurisdiction* over rates applicable to interstate commerce. While the mere existence of a grant of power to the Federal Government may not be incompatible with the exercise of the same power by the states in the absence of Congressional legislation, yet certain grants have been made to Congress that are of such a nature as to require exclusive legislation by Congress. The rule for determining into which class the particular grant belongs is well laid down in *Cooley vs.*

Board of Wardens of Port of Philadelphia, 12 Howard, 299, at page 319, in the following language:

“* * * Whatever subjects of this power (interstate commerce) are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require *exclusive legislation by congress*. * * *.”
(Italics ours.)

This rule has been adopted in the cases cited above, from which it would appear that the doctrine is well established that the Federal Government has exclusive jurisdiction over interstate rates, and that the failure of the Federal Government (if it is a fact that the Interstate Commerce Commission is without authority) to regulate an interstate rate of the character under consideration does not give the state the right to regulate such rate in the absence of federal regulation.

Second, it overlooks the fact that the Railroad Commission of Ohio did not claim authority to regulate the rate, because the Federal Government had failed to authorize the Interstate Commerce Commission to regulate the same and the state therefore had the power to do so, but because it found that the rate was in fact an intrastate rate. As stated by the United States Circuit Court of Appeals (187 Fed. Rep., at page 987):

“The law of Ohio defining its (Railroad Commission of Ohio) authority confined its functions to intrastate transactions and gave it no authority to interfere with interstate commerce. * * * It follows its order is not one sanctioned by the laws of the state and derives no force or validity from its assumption of a power not delegated to it by the Legislature.”

The Ohio Railroad Commission assumed to regulate the rate *because it erroneously reached the conclusion that the rate applied to intrastate commerce and not upon the theory that it applied to a portion of interstate com-*

merce respecting which the Federal Government had failed to provide regulation thereby.

(5)

CASES CITED BY APPELLANT ARE NOT APPLICABLE.

The principles announced in the foregoing cases are not inconsistent with and have not been modified or overruled in any case cited in appellant's brief. The cases when carefully analyzed *will not be found* to hold that the intention of the parties, the character of the traffic or destination of commodity are irrelevant in a case like the one at bar, nor will they be found to be decisive of the questions here. In all of the cases one or more of the elements are absent that are present in the case at bar—either one of the parties did not intend to engage in interstate commerce, or the carriage is not continuous, or the rate bore no relation to the ultimate destination, or the destination was not in fact known, or could not be known at the time the commodity was placed in the hands of the carrier. This is best illustrated by taking up and analyzing some of the cases cited in appellant's brief.

(1) *Heiserman vs. Burlington Railroad Company*, 63 Ia., 732.

This is an action by a shipper to recover freight charges in excess of a state statutory rate. The railroad company defended upon the ground that the traffic was interstate and that the interstate rate applied. The court, however, found that the *contract* provided only for an intrastate transportation and it showed on its face that the original carrier was *undertaking to exempt itself from any connection with the succeeding carriage*. The situation is entirely different in the case at bar, inasmuch as the facts show that the rail transportation and the unloading service are intended by the rail carrier to be and are necessary links in the transportation of the coal from the No. 8 district to its distributing market at the head of the Great Lakes.

- (2) *Missouri, etc., Company vs. Cape Girardeau, etc., Co.*, 1 I. C. C. Rep., 30, 1887 (1 I. C. R., 607).

An examination of the opinion discloses that the facts in the above case are clearly distinguishable from the facts in the case at bar. The ties were delivered to a purchaser within the state and *the transportation of the ties into another state was by a new transit entirely independent of any known relation to the service performed by the defendant.* The Commission consequently declined to entertain the complaint. This case is lacking in several of the elements that appear in the case at bar.

- (3) *New Jersey Fruit Exchange vs. Central Railroad of New Jersey*, 2 I. C. C. Rep., 142, 1888 (2 I. C. R., 84).

This was an action to require the defendants to reduce the rate on fruit from Flemington, New Jersey, to New York. The defendant denied that it made any rate from New Jersey points to the City of New York, but alleged that during fruit season it ran trains to Jersey City. The Commission found that "the undisputed facts are that the delivery is actually made in Jersey City; that the returns of the commission merchant invariably show the detention of a given sum for freight and four cents for cartage and that the consignees desire to receive and in fact actually do receive the peaches in Jersey City. Whatever *prima facie* contract may in some cases be inferred from the receipt of an addressed parcel, it is clear that in the present case no duty is undertaken and none devolves upon them beyond the delivery of the peaches at Jersey City. Upon this finding the Commission very properly concluded (page 86) that the transportation did not relate to interstate commerce. The facts are so different from the facts in the case at bar that further comment is unnecessary.

- (4) *Fort Worth, etc., R. R. Co. vs. Whitehead*, 26 S. W. Rep., 172 (Texas Civil Appeal, 1894).

The syllabus in this case shows that the court's opinion was based upon the express finding that the railroad

company was engaged "only in carrying between the points in the state * * * without any *understanding* or arrangement that it should become a link in a chain of transportation outside the state." (Italics ours.)

The court say, page 173:

"It (railroad company) did not offer to show that it had authorized or ratified such through shipments nor that it was engaged in transportation under a common control, management or arrangement for a continuous carriage from the Indian Territory to Decatur or other points."

Page 174:

"While we have a statute which compels a carrier to receive goods from a connecting carrier there is no law, state or federal, which requires any carrier operating within this state to engage in the business of interstate carriage. If appellant (as we think should be inferred from its motion and brief) only engaged between Fort Worth and Decatur and other Texas points and only received the coal at Fort Worth in obedience to the statute just referred to, as it would have received goods originally shipped from Fort Worth or other points in Texas *without any sort of understanding or arrangement, express or implied*, that it should become a link in a chain of transportation from points beyond this state, we are of the opinion that the mere fact that the shipment of coal in question was undertaken by the Missouri, Kansas & Texas Railway Company in the Indian Territory to Fort Worth and thence to Decatur as its place of ultimate destination did not bring the act of appellant in carrying the coal forward to Decatur within the scope of interstate commerce regulation." (Italics ours.)

The facts in the case at bar show that the railroad company is a link in the interstate transportation and that all the parties intend it to be such; that it treats itself as a link in such interstate transportation, in the character of ~~the~~ service rendered and in the manner in which lake rates are made. We submit that this case is

not authority for the proposition that the intention and acts of the parties should not be considered in determining what the contract and arrangement really is.

(5) *Cincinnati, etc., Railroad Company vs. Interstate Commerce Commission*, 162 U. S., 184.

The defendant quotes from page 192 of the opinion. The facts in the suppositious case suggested by the Supreme Court are not analogous to the facts in the case at bar, because (a) the railroad company intends to participate in interstate commerce, (b) the destination of the coal when it leaves the mine on the lake-cargo rate is known to be a point outside the state, (c) and the journey is continuous by rail and vessel in accordance with the custom prevailing in the transportation of this commodity and with the arrangements made by the coal operator with the carriers in connection with its transportation. When the coal reaches Huron, its destination so far as the railroad company is concerned, is not at an end. The railroad company must put it on board a vessel, so that the transportation from lower lake port to upper lake port is not independent of any existing arrangement with the railroad company that had transported the coal to Huron. In this connection the Court's attention is called to the language of the court on page 193:

"All we wish to be understood to hold is that when goods shipped under a through bill of lading from a point in one state to a point in another state are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. *When we speak of a through bill of lading we are referring to the usual method in use by connecting companies and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested.*" (Italics ours.)

It will also be noticed in this case the court was discussing the jurisdiction of the Interstate Commerce Commission whose scope of authority is limited to certain interstate matters. If the railroad company were attempting to escape federal control insofar as the lake coal rate is concerned, we submit the court would have no difficulty in determining from the facts in the case that the railroad company has elected to become a part of a continuous line of transportation and that the parties engaging in the transportation of lake cargo coal from the No. 8 district to the head of the lakes, to-wit—the shipper, the railroad company and the vessel carriers—were doing so in pursuance of a common understanding or arrangement with reference to such traffic.

(6) *Minneapolis, etc., Railroad Co. vs. State of Minnesota*, 186 U. S., 257.

No question as to whether the commodity was moving in interstate commerce or not was presented in this case. Two questions arose, (1) the constitutionality of the Railroad Commission Act insofar as it assumed to establish joint through rates or tariffs over the line of independent connecting railroads, (2) and whether the tariff fixed by the Commission was compensatory. The railroad company in the first contended that it was beyond the constitutional power of the legislature to compel companies to enter into involuntary contracts with others at the instance of third parties, but the court held that in the case under discussion it was unnecessary for it to pass upon that question, as there was a joint tariff between the two roads which had been agreed upon and that such tariff was within the control of the legislature just as much as if it related only to transportation over a single line.

(7) *United States vs. Geddes*, 131 Fed. Rep., 452.

This is one of the early safety appliance cases. The opinion of the court discloses that the railroad company

(claiming to be exempt from the Federal Safety Appliance Act)

“limited its interest, so far as it could, to the transportation of the freight over its own line. It made no arrangement with the Baltimore & Ohio for through carriage either way. *It was interested in none. It shared in none. It was interested only in its own local charge, and whatever arrangement it made was with a view simply of securing this.*” (Italics ours.)

In this respect the case differs from the case at bar, where the railroad company is interested in the arrangement the shippers make for vessels, because it cannot perform its obligation with reference to the loading of the coal into the hold of the vessel and is further interested in the destination of the coal, to-wit, at the head of the Great Lakes, for it makes its own charge for the rail haul of such through journey in the same way in which “proportionate rates” are made and which bear a relation to the total charges covering the entire journey.

(8) *White vs. St. Louis, etc., R. R. Co.*, 86 S. W., Rep., 962.

The facts as appear from the syllabus of the case clearly distinguish it from the case at bar.

Syllabus 1:

“A passenger was carried by three separate railroads from a point outside the state to a point within the state. He had separate transportation issued by the respective companies. The last railroad company carried him from points within the state. The passenger’s baggage was checked through from point of beginning to point of destination. By what authority the agent of the initial carrier so checked the baggage did not appear. *Held*, that the last railroad company was engaged in state commerce and Revised Statutes 1895, Article 320, expressly prohibited it from limiting its liability as a common carrier of the baggage.”

The court say, page 964:

"It is obvious that the ticket and free passes held by Mrs. White were not in any way connected with or related to each other; that the right of transportation granted by each was limited to the respective lines of railroad operated by the company issuing the same; * * *; the checking of her trunk by its agent through to Dallas, Texas, did not create any obligation on the part of the St. Louis Southwestern Railroad Company to receive her * * *."

It also appears in the case that the last railroad company issuing the pass for the last stages of the journey had a right to cancel the pass at any time. There is lacking in this case all of the elements that are presented in the case at bar showing a common arrangement, purpose and intention with reference to the transportation of lake coal from the mines in Ohio to the head of the Great Lakes.

(9) *Gulf, C. & S. F. Ry. Co. vs. Texas*, 204 U. S., 403.

This was a case brought by the State of Texas against the Gulf, Colorado & Santa Fe Railway Company to recover \$100 as a penalty for extortion, in a charge for the transportation of a carload of corn from Texarkana, Texas, to Goldthwait, Texas. The corn was carried between these cities "upon a bill of lading which upon its face showed only a local transportation." (See page 411.) The essence of the decision of the court is found on page 414:

"It must be further remembered that no bill of lading was issued from Texarkana to Goldthwait until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it had made to know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not

obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. *It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability implied by the contract.*" (Italics ours.)

There was no evidence that the railroad knew any more about the shipment than was contained in the bill of lading, and it surely would have been unjust to inflict a penalty upon it because of the unrevealed intention of the successive owners of grain. It is elementary that there can be no contract unless there is a meeting of the minds. The Texas Railroad had no knowledge of the intention of the successive owners of the grain and consequently the contract as evidenced by the bill of lading cannot be interpreted as relating to an interstate shipment simply because one of the parties intend it to be such when it shows on its face that it relates to a shipment between two points in Texas. Such intention was therefore, under the facts, shown by the findings of fact, upon which the decision was based and to which it was limited, immaterial.

It is instructive to examine the decisions of the Texas courts in the same case, which decisions were affirmed by the United States Supreme Court. The decisions of the lower courts go somewhat more fully into the question involved than does the Supreme Court in its brief opinion, and recognize as important the considerations which we are urging as a feature upon which this case is to be distinguished from the case at bar, to-wit: the intent of the parties. Thus, in *Gulf, Colorado & Santa Fe Ry. Co. vs. Texas*, 32 Tex. Civil App., 1, the court clearly recognizes that the intent of the shipper is important. It distinguishes some apparently conflicting

cases upon this very ground. At page 9 the court says:

"It is insisted, however, that the purpose or intent of the parties is irrelevant and immaterial. It may be and is doubtless so, when such purpose does not enter into the question of fact involved. But when necessary to determine the character of the shipment, or the status of the property as interstate commerce or otherwise, it may undoubtedly be considered. The purpose of the shipper, as an element of the fact to be found, was ascertained and given effect not only in the cases of *Waggoner vs. Whaley* and *State vs. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.), 44 S. W., 542, but also in *Cutting vs. Florida Ry. & Nav. Co.* (C. C.), 46 Fed. Rep., 641, as may be seen from an examination of those cases. See also Sec. 7, *Interstate Commerce Act*, page 3159 (3 U. S. Comp. St., 1901)."

Not only did the defendant railroad in the Texas case seem to be ignorant of the intention of the shippers of the grain to make an interstate shipment, but the Texas Supreme Court thought that the Harroun Commission Company, the original consignor, was also ignorant of the destination of the grain. See *Gulf, C. & S. F. Ry. Co. vs. Texas*, 97 Tex., 274, at page 284:

"Here the Harroun Commission Company, the original consignor, were the owners of the corn when shipped, and until its arrival at Texarkana and delivery there to the Hardin Grain Company, in compliance with their contract for its sale, *they neither intended nor contemplated any shipment beyond the point to which it was consigned.*" (Italics ours.)

From the foregoing considerations, it must be apparent that the facts in the case at bar are vitally different from those in *Gulf, C. & S. F. Ry. Co. vs. Texas*, 204 U. S., 403, and the decision in that case cannot be regarded as a controlling authority when the facts as to the intention and knowledge of the parties are entirely different and the carriage is continuous in accordance with the arrangement made by the parties

and one of the parties—the railroad company—performs not only the rail service, but a service necessarily incident to the vessel carriage, to-wit, unloading into the hold of vessels.

This view of the case of *Gulf, C. & S. F. Ry. Co. vs. Texas*, 204 U. S., 403, is in harmony with the view of the Federal Court in the following cases: *United States vs. Philadelphia & R. Ry. Co.*, 188 Fed., 484, at page 486 (District Court, E. D. Pennsylvania, decided May 24, 1911), and *Texas & Pac. Ry. Co. et al. vs. Railroad Commission of Louisiana*, 183 Fed. Rep., 1005, at pages 1007 and 1008 (Circuit Court, E. D. Louisiana, decided December 22, 1910).

(10) *Laning Harris Coal Co. vs. Missouri Pacific Ry.*, 13 I. C. R., 154.

There is nothing in this case to show that the transportation of the coal from Springfield to Salina was intended by the parties to be a continuous shipment or that the railroad company based its rates on the assumption that they related to a through rate. The gist of the opinion is found on page 156:

“From the facts it is clear that the complainant intended these as strictly local shipments and no evidence was offered by defendant to controvert this contention. It is true that complainant was unable to say positively whether or not these particular cars of coal had been sold by it prior to the time they reached Kansas City, but it is a fact that no orders were given to the defendant to carry the coal to any other points until after it had reached Kansas City. It is also true that this method of doing business is very customary. A dealer in coal, as in this case, locates at some central point of distribution and to that point he consigns in the first instance most of his coal. Some of it is actually consumed at such point as in the case at Kansas City, and some of it sold at other points, and it is generally difficult to determine definitely which particular car of coal is sold prior to its receipt at the cen-

tral point of distribution. Under such circumstances and conditions when the coal is actually shipped into such central point of distribution and delivery is there made it must be regarded as a local shipment."

Lake coal moves from the No. 8 district to the head of the lakes, which is the central point of distribution for the Northwest. The carriage is continuous and the carriers are in possession of the coal throughout its entire journey until it reaches such central point of distribution.

(11) *Kansas City, etc., R. R. Co. vs. Brooks*, 105 S. W. Rep., 93.

Syllabus one and syllabus two show very clearly a different state of facts than exist in the case at bar. This case is not authority for the proposition that the intention of the parties is irrelevant. In fact, the contrary appears. Otherwise, the court could not have reached the conclusion that it did.

(12) *Augusta Brokerage Company vs. Georgia Railway Company*, 62 S. E. Rep., 996.

In this case the goods are redelivered to the consignor within the state. Assuming for the sake of argument that this Court is right in saying (page 997) that

"the law is not dealing with the intention of the consignee, but solely with the relation of the railroad to the freight transported,"

it does not follow that the traffic is always intrastate where the service is all performed within the state. Where the railroad agrees that if the consignor ship his coal to a point outside the state he shall have a special rate; where the consignor accepts this special rate; where the coal actually reaches a destination outside the state in one continuous and uninterrupted transit during which the possession of the carrier is at no time surrendered to the consignor, does not the railroad treat this as an interstate shipment and must it not therefore be considered an interstate shipment even when judged

by the test laid down by this court? Subsequent language of the court (pages 997-8) makes this apparent:

“If the railroad refuses to carry beyond its own lines and compels unloading at its terminus in Georgia, such business in its relation to the railroad is wholly intrastate.”

In short, the railroad having refused to deal with this shipment as one made to a point without the state, the service is as to it purely intrastate, but had the railroad undertaken to carry the cotton seed on terms similar to those on which the coal was actually carried, in the case at bar, it would only be consistent with the language of the court to regard the carriage by the railroad, though performed wholly within the State of Georgia as interstate traffic.

(13) *Texas, etc., Railroad Company vs. The Sabine Tram Company*, 121 S. W., 256.

In this case, lumber was shipped from Ruliff, Texas, to Sabine, Texas, to the Sabine Tram Company, “Notify W. A. Powell Company.” The court say, page 258:

“No other contract or arrangement was made by the Sabine Tram Company for the carriage of the lumber, except that evidenced by the bills of lading aforesaid. Way bills accompanied the shipment, upon which were marked in pencil ‘For export,’ but the Sabine Tram Company had no connection with, or knowledge of the making of these way bills, which was the act of the Railway Company alone.”

Page 259:

“Upon arrival at the station at Sabine, it was by direction of the agent of the Powell Company carried without delay about a quarter of a mile beyond the station to the dock, where the lumber was to be unloaded. The lumber was unloaded from the cars into the water in the slip, in reach of the ship’s tackle, ready for loading on to the ship. The Sabine Tram Company have no connection with this further carriage or switching of the lumber to the docks aft-

ter its arrival at the station at Sabine, but this was done solely at the instance and under direction of the agent of the Powell Company."

Page 261:

"The case is very much stronger here against the view that the movement to Sabine of a foreign shipment, in that the further movement of the lumber after reaching Sabine *was a matter with which the shipper, The Sabine Tram Company, had nothing whatever to do, and which was never at any time, in its mind, except as a surmise or general idea that the Powell Company intended the lumber for foreign shipment, after delivery to them, and after it became their property, upon payment for the sale and delivery of the bills of lading.*" (Italics ours.)

This case, then, is distinguishable from the one at bar, in that: (1) Here the owner takes possession of its goods and interrupts the transit, whereas in our case the owner assumes no control over the coal from the time it leaves the No. 8 district until it reaches some lake port outside the State; (2) Here the court expressly states and in determining that the carriage is intrastate relies on the fact (page 259) that the carrier has nothing to do with the unloading of the lumber from the car, and the reloading of its upon the ship. In our case, the reloading of the coal upon boats bound to points without the State is part of the service included in the carrier's charge; (3) Here there is no special rate for interstate shipments. The consignor deals with the carrier on a strictly intrastate basis. True (page 258) way bills accompanied the shipments, upon which were marked in pencil "For export," but the Sabine Tram Company had *"no connection or knowledge of the making of these way-bills, which was the act of the railway company alone."* (Italics ours.) In our case, the fact that the coal is destined for a point without the state is known both by the consignor and the carrier, and this fact alone determines what compensation the carrier shall receive.

- (14) *Oregon R. & Navigation Co. vs. Campbell, et al.*, 180 Fed. Rep., 243 (Circuit Court of Oregon, 1910.)

This case is not decisive, for the reason that neither the transportation from Portland (the termination of the vessel transportation) to La Grande, both in the State of Oregon, nor the rail rate applicable thereto, had any relation to the vessel transportation from California to Portland, Oregon. In the case at bar, the rate applicable to the rail portion of the transportation of lake cargo coal is conditioned upon the subsequent transshipment by vessel from lower lake port to upper lake port. The opinion of the court in the case cited is predicated upon the assumption that the contract of rail shipment is absolutely independent of the contract of vessel shipment. Court say, page 256:

“The case turns upon the contract of shipment between the shipper and the carrier, and when that is at an end, the shipper can claim nothing further as it respects the property carried. It is then at the command of the owner, and if he chooses to ship it again from one point to another in the state, it becomes an intrastate shipment, notwithstanding the owner may be dealing with an article of interstate commerce.”

- (15) *Coe vs. Errol*, 116 U. S., 517.

This is a tax case in which the owner of logs attempted to evade taxation by the town of Errol, New Hampshire, on the ground that the logs were *in transit* to Maine and the subject of interstate commerce.

On page 524, the court say:

“The question for us to consider, therefore, is, whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and *partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another state.*” (Italics ours.)

Again on page 525, the court say:

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution."

"This case does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other cause of delay as was the case of logs cut in Maine, the tax on which was abated * * *. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. *And so we think would be the goods in question when actually started in the course of transportation to another state or delivered to a carrier for such transportation.*" (Italics ours.)

Again on page 527, the court say:

"It seem to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. *If such were the rule in many states there would be nothing but the lands and real estate to bear the taxes.*" (Italics ours.)

From the foregoing it appears (a) that the property was not in *course* of actual construction, (b) no common carrier engaged in interstate commerce was in possession of the same, (c) and actually transporting the same, (d) and nothing being done either by the owner of the property or any one for it in actually carrying out the owner's alleged intention to carry the logs to some other state, (e) or that the logs were ever carried out of the state. The court very properly decided that under such circumstances the alleged intention did not control and would not deprive the state of its right to tax the commodity, because any other view would put it in the power of an owner of personal property capable of transportation to swear the same free from taxation on tax day by simply alleging *an intent* to carry the same out of the

State. This is far from saying that intent may not be material under certain circumstances for the purpose of determining the character of a particular act or series of acts.

In the case at bar the coal is (a) actually moving from the mines en route to the Northwest (b) via the route served by two common carriers (railroad and vessel) (c) under contemporaneous arrangements made by the shipper, (d) both of which are necessarily related to each other in the interstate transportation because the owner would not contract with one carrier without the other (e) and from the moment the coal leaves the mine until it reaches final destination in the Northwest it is in the continuous custody and control of the carriers, each performing its particular function in such transportation.

(16) *Diamond Match Company vs. Village of Ontonagon*, 188 U. S., 82.

In this case logs were placed in a stream to be used at a mill within the state. In the autumn of 1896 this mill was destroyed. Every driving season thereafter some of the logs were sent to a mill in another State. The taxation of these logs in 1899 was resisted upon the ground that the logs were in course of transportation to points without the State.

Court say, page 97:

“The number of logs shipped from Ontonagon to Green Bay before the levy of the tax complained of is given in the stipulation of facts and it is stipulated that ‘about five hundred thousand feet of complainant’s said logs in said river have been (in said river of Slough) constantly within said village since 1898 *for the purpose of shipment by rail to the destination aforesaid.*’ ” (Italics ours.)

“The appellant’s contention is that the movement of the logs commenced at the opening of the navigation of the river (presumably in the spring

or summer of 1896 and 1897), and from that date they were in continuous transit as subject of interstate commerce and exempt from taxation. The contention is more extreme than that made and rejected in *Coe vs. Errol*." (Italics ours.)

The court found against the contention of the company by following the case of *Kelley vs. Rhoades*, 188 U. S., 1, holding that while property is at rest for an indefinite time or awaiting transportation, or awaiting sale at its place of destination or at an intermediate point it is subject to taxation, but said on page 96:

"But if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment." (Italics ours.)

Lake coal moving from the No. 8 district is actually in transit until it reaches docks at the head of the lakes and at no time is it out of the possession of the carriers. In fact, the language of the court just above quoted is ample authority for the court below holding that the lake cargo rate is an interstate rate and not subject to regulation by the state commission.

(17) *People of New York vs. Knight*, 192 U. S., 21.

The vital distinction between this case and the case at bar is well stated by the court on page 27:

"As we have seen, the cab service is rendered wholly within the state and has no contractual or necessary relation to interstate transportation. It is independently contracted for and not necessarily connected therewith." (Italics ours.)

The court even finds that on the company's own showing the fact that the service is intended only for those starting or concluding an interstate journey is not brought home to the patrons of the cabs and thus there is one element lacking in proof of concerted arrangement with reference to an interstate transportation which is found in the case at bar, inasmuch as the shipper, the railroad company, the vessel carrier each in its turn per-



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forms its function with reference to the transportation of lake cargo coal from the No. 8 district to its central point of distribution at the head of the Great Lakes, and all joining in such common purpose.

(18) *Larabee Flour Mill Co. vs. Mo. Pac.*, 211 U. S., 612.

This was a case in which a state railroad commission made an order requiring the defendant railroad company to afford equal local switching service to its shippers. In passing upon the case, the Supreme Court said, on page 612:

“This case does not rest upon any distinction between interstate commerce and that wholly within the state.”

The Supreme Court affirmed the judgment of the lower court on the ground that furnishing cars is a matter respecting which a state may act until the Federal Government takes some action, notwithstanding the matter may relate to interstate commerce. Car distribution and regulation of rates are entirely different matters, and this case has not overruled the cases above cited that regulation of interstate rates is vested exclusively in the Federal Government.

There is nothing in the opinion of the court below in conflict with the position here taken. The court said:

“The custody of the carrier is not impressed with the change which frees the goods from domestic control until after they have been finally released to it by the consignor for transportation to a destination fixed beyond the state line; and under the custom prevailing at Stafford this does not occur until the cars have been taken to the transfer track, received by the Santa Fe and finally billed.”

In the case at bar the coal is released to the carrier when it leaves the mines and its destination fixed to a point beyond the state. Otherwise, the operator cannot forward the coal on the 90-cent rate, but must pay the full commercial rate of a dollar. Under the circum-

stances in this case the operator cannot change his mind and divert the coal and take advantage of the 90-cent rate. The railroad's contract duty is not fully performed until it places the coal in the boat, and by so doing the parties again ratify and confirm what was agreed upon respecting the coal when it was billed from the mines to Huron as lake coal, viz., that this coal is an interstate shipment and its destination fixed beyond the state line.

- (19) *Chicago, etc., Ry. Co. vs. Becker, et al.*, 32 Fed., 849.

Court say, on page 854:

"This charge (switching charge) is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment. The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the state, in the same manner as the carriage by dray per load or distance is established for the public good. And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. The service is local, * * *."

- (20) *Chicago, I. & L. Ry. Co. vs. Railroad Commission of Indiana*, 87 N. E. Rep., 1030.

The conclusions of the court are based upon the finding that the service as rendered was strictly local and was not necessarily or incidentally connected with interstate commerce. This is emphasized by the following quotation from the opinion, page 1032:

"In so far as appears, the service rendered by appellant, was, in nature, the same as if it had drawn the cars to and from the gravel quarry by horses for a stipulated sum per car; * * *."

Further analysis of the opinion will disclose that there was no testimony to show that all the parties to the transaction were intending to engage in interstate commerce and were performing their respective functions in accordance with such intention.

In the case at bar the shipper has no such right when the coal reaches Huron. After the coal is unloaded into vessels, that vessel carrier is in possession and control of the coal, subject only to the shipper's right of *stoppage in transitu*. Furthermore, if the shipper diverts the coal, either locally at Huron or some other point on the line, the shipment loses its lake cargo character and the right to move on the lake cargo rate. None of these elements were presented in the case cited, and clearly distinguish it from the case at bar.

(21) *Wells-Higman Co. vs. Grand Rapids, etc., Ry. Co.*, 19 I. C. C. R., 487.

In this case the Commission say, at page 489:

"By the terms of the bill of lading issued by defendant, Illinois Central, only a movement from Metropolis, Ill., to Chicago, Ill., was contracted for, and there was nothing to indicate that the shipment would ultimately find its way outside the state * * *."

The facts of this case are clearly distinguishable from those in the case at bar, where everything indicates that the shipments of coal are intended by all parties to find their way outside of the State of Ohio.

(22) *Wood-Hagenbarth Cattle Co. vs. Galveston, etc., Co.*, 130 S. W. Rep., 857.

In this case there was a re-delivery of the cattle to the shipper and the making of a new contract of shipment by him with another railroad. It was a case where the carriage was not continuous and the rate bore no relation to the ultimate destination. Furthermore, the court was strongly influenced by the fact that the carrier had no knowledge of the shipper's intention of sending the cattle outside of the state. In the case at bar the railroad

company knows the intention of the shipper and makes a special rate on lake coal, because it knows this coal is to go beyond the boundaries of Ohio.

- (23) *Texas & Pacific Ry. Co. vs. Taylor*, 126 S. W. Rep., 1117.

The court in this case held the shipment to be intrastate, because "the contract of the initial carrier terminated at the point where the freight was restored to the control of the shipper and a new contract became necessary to the transportation of the freight to the final destination." This case is distinguishable from the case at bar, in that in our case the interstate journey is never broken by the restoring of the coal to the shipper. The coal when it leaves the mine is continuously in the possession of the carrier until it reaches its destination at the head of the Great Lakes.

- (24) *United States vs. Chicago K. & S. R. R. Co.* 81 Fed., 783.

In this case it was held a domestic railroad company which transported freight solely on local bill of lading under a special contract limited to its own line and without dividing charges with any other carriers and assuming any other obligations to or for them, did not come within the provisions of the Interstate Commerce Act. In the case at bar, far from holding itself aloof from connecting carriers the transportation of lake cargo coal from the No. 8 district to the head of the Great Lakes is one entire transaction participated in by the shipper, the railroad company and the vessel carrier under a common arrangement, all of which has to do with the movement of lake coal upon its interstate journey.

- (25) *Interstate Commerce Commission vs. Bellaire, Z. & C. Ry. Co.*, 77 Fed., 942.

The facts in this case are similar to those in *United States vs. Chicago, K. & S. R. R. Co.*, but bear no resemblance to those in the case at bar.

- (26) *Mutual Transit Company vs. United States*, 173 Fed Rep., 664.

An examination of the facts of this case will disclose there was no such common arrangement as exists in the case at bar.

- (27) *Dobbs vs. Louisville & N. R. R. Co.*, 18 I. C. C. R., 210.

In this case the rate made by the first carrier was not in any sense a proportional rate as in the case at bar, where the rate is constructed with reference to the total through carrying charges from the mines to the head of the lakes.

III.

CONCLUSION.

The argument of the appellant proceeds upon the theory that no arrangement or understanding of any kind exists between the vessel carrier and the rail carrier and that the rail carrier does not even know the kind of an arrangement the shipper or purchaser makes with the water carrier, unless they casually learn of the arrangement after it has been consummated. This position is not substantiated by the testimony except insofar as it may be intended to relate to the exact arrangement and the exact rate made with and secured from the vessel carrier from time to time for the transportation of coal from the lower lake port to the upper lake port. Counsel for the appellant have overlooked the fact that the rate in question is made in consideration of the purpose of the shipper to forward the coal up the lakes to another state after the railroad company has performed its portion of the carriage from the No. 8 district to the lower lake ports. This fact is important because in this sense the intention of the shippers and the acts pursuant thereto are important elements in determining the question at issue.

A distinction must be drawn between a mere expressed intention of the shipper to forward his property to another state after the conclusion of the carriage which is the subject of the immediate contract, and such intention or purpose when it becomes a part of and one of the terms of the contract between the carrier and the shipper. Applying this distinction to the case at bar, it will be found that the lake-cargo rate can only be obtained when the shipper designates his shipment "lake coal," consigns it to a lake port, and thereafter actually trans-ships it by boat beyond that port. The subsequent shipment by boat is a part of the contract of carriage between the railroad company and the shipper, and is the most essential part of it, insofar as the rates are concerned (because the lake-cargo rate is a "proportional rate" and is lower than the commercial rate to the same point, for the reason that the coal is destined for points beyond) and thus constitutes a joint arrangement between the shipper and the rail carrier that the carriage shall not end at the lower lake port, but shall continue by another carrier (which the shipper, by implied agreement, obligates himself to secure) beyond that point by boat. *The traffic is thus marked at the outset as an interstate shipment.*

The application of this distinction is shown in elementary cases in contracts where an illegal consideration is involved. A loan of money to pay a gambling debt or to gamble with cannot be recovered, when the lender is interested in the gambling transaction or the purpose for which the loan is made is an element of the contract. On the other hand, the loan may be recovered when the lender knows the object or purpose of the borrower, but is himself not interested, or where such object or purpose is not a part of or necessarily related to the contract of loan. See *Beach on Modern Law of Contracts*, Sec. 1484, and cases cited.

That the shipper may divert his coal after it reaches the lake port does not alter the situation. The moment he does another rate applies, and the original shipment (lake-cargo coal) drops out of consideration so far as the present controversy is concerned, and another and new rate (another and new contract) by consent of the parties is substituted. The rate controversy involved in this proceeding is necessarily limited to those shipments which have moved or will move by boat beyond the lower lake port and which carry out the original contract between the shipper and the railroad company respecting the rate applicable to coal known as "lake coal"; that is, coal for shipment from the No. 8 mines to the head of the Great Lakes. A diversion of lake-cargo coal to some other point, or to commercial coal, abrogates the lake-cargo contract and substitutes another.

If a shipment is made from San Francisco to New York and is actually started on its journey upon a rate based upon the carriage from San Francisco to New York, it is an interstate shipment, and the rate applicable thereto constitutes a contract between the parties relating to interstate commerce. If, however, the shipper stops the shipment *in transitu* at Los Angeles, and, by consent of the parties, the rate from San Francisco to Los Angeles is applied and the shipment actually used at Los Angeles, the same shipment may become state traffic, but this is because the contract originally made has been rescinded and a new one substituted, as well as because the shipment is physically stopped there. *In other words, it requires a modification of the contract of carriage in addition to the change in physical movement to deprive it of its interstate character.*

If the appellee were seeking to evade federal control upon the ground that the rail carriage and the loading service for which it makes a rate similar to a "proportional rate" in consideration of the fact that the coal is

destined for points beyond, should be treated as an independent transaction, bearing no relation to the remainder of the journey or to the trade engaged in by the shipper engaging in lake cargo trade, and was also claiming that the lake cargo rate on its face showed that the railroad company did not intend to participate with the shipper in engaging in interstate commerce, such claim and contention on the part of the appellee very properly should be treated as nothing more than a subterfuge for the purpose of avoiding federal control. In the present instance, however, the appellee is not seeking to evade federal control, but claims that the railroad company is engaging in interstate commerce when it engages in the transportation of lake cargo coal, and this contention is all the more real and apparent when consideration is given to the fact that the lake cargo coal from the No. 8 district meets in competition in the Northwest with lake cargo coal from the Pennsylvania and West Virginia districts.

We submit that the facts in this case and the law applicable thereto stamp the rate in question as a rate pertaining to interstate commerce, the exclusive control of which is vested in the Federal Government.

Respectfully submitted,

W. B. SANDERS,

W. M. DUNCAN,

Of Counsel.



Supreme Court of the United States.

October Term, 1911.

No. 776.

Office Supreme Court U. S.
FILED

NOV 2 1911

JAMES H. MCKENNEY,

Clerk.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

**B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,**

APPELLEE.

**Notice of Motion for Leave to File Exhibits,
Motion and Exhibits.**

**WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.**



Supreme Court of the United States.

October Term, 1911.

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RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

APPELLEE.

Notice of Motion for Leave to File Exhibits.

To Timothy S. Hogan,
Frank Davis, Jr.,
Charles C. Marshall,
T. H. Hogsett,
Counsel for Appellant.

Please take notice that the appellee will make a motion before the Court at the opening of its session on Monday, the 6th day of November, 1911, at or about the hour of noon, or as soon thereafter as counsel can be heard, for leave to file as exhibits to the cause certain copies of records of the Interstate Commerce Commission, as set forth in detail in said motion, copy of which motion is herewith served upon you.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

Service of the above notice is hereby accepted, and receipt of copy thereof and copy of motion and exhibits thereto attached, is hereby acknowledged this 30th day of October, A. D. 1911.

TIMOTHY S. HOGAN,
FRANK DAVIS, JR.,
CHARLES C. MARSHALL,
T. H. HOGSETT,

Counsel for Appellant.

EXHIBIT "A."

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of November, 1910.

INVESTIGATION AND SUSPENSION DOCKET NO. 26-A.

IN THE MATTER OF THE INVESTIGATION OF INCREASES IN COAL RATES BY THE NOR- FOLK & WESTERN RAILWAY COMPANY.

IT APPEARING from the records of the Interstate Commerce Commission that there has been filed with the Commission by the Norfolk & Western Railway Company certain schedules designated as supplement No. 21 to I. C. C. No. 2387-B, which schedule states new individual and joint rates and charges applicable upon coal that are in excess of the rates and charges now in effect,

IT IS ORDERED, That the Commission on its own initiative and upon complaint without formal pleading and without answer by the interested carriers do enter upon a hearing concerning the propriety of such advances and the lawfulness of the rates and charges stated in said schedule with a view to making such order in the premises as may after full hearing seem just and proper, and that such hearing be held at such time and place as may be hereafter fixed by the Commission.

THE COMMISSION being further of the opinion that pending such hearing and decision of the Commission as to the propriety of such rates and charges the

operation of such schedule should be postponed for the reason that from a consideration of the character and amount of the advances and the circumstances under which they have been made, it appears to the Commission that there is sufficient ground for claiming that said advances are unlawful and that the rates and charges established by said schedule are unjust and unreasonable and therefore unlawful, and that the public interest requires that the operation of said schedule be deferred until sufficient time has been given for an investigation by this Commission.

IT IS FURTHER ORDERED, That the operation of the aforesaid schedule be suspended and that the use of the rates and charges therein specified be deferred until the 15th day of March, A. D. 1911.

IT IS FURTHER ORDERED, That the several carriers named in said schedule as parties thereto, and hereinafter named, be and they are hereby made parties to this proceeding, and that a copy of this order be forthwith served upon each of them, viz.:

Ann Arbor Railroad Company.

The Ashland & Western Railway Company.

The Atchison, Topeka & Santa Fe Railway Company.

Au Sable & Northwestern Railway Company.

The Baltimore & Ohio Railroad Company.

The Baltimore & Ohio Southwestern Railroad Company.

Boyne City, Gaylord & Alpena Railroad Company.

Central Indiana Railway Company.

The Chesapeake & Ohio Railway Company of Indiana.

Chicago & Eastern Illinois Railroad Company.

Chicago & Erie Railroad Company.

Chicago & North Western Railway Company.

Chicago, Burlington & Quincy Railroad Company.

Chicago Great Western Railroad Company.

Chicago Junction Railway Company.

Chicago, Indiana & Southern Railroad Company.

Chicago, Indianapolis & Louisville Railway Company.

Chicago, Kalamazoo & Saginaw Railway Company.

Chicago, Milwaukee & Gary Railway Company.

Chicago, Milwaukee & St. Paul Railway Company.

The Chicago, Rock Island & Pacific Railway Company.

Chicago Terminal Transfer Railroad Company.

Myron J. Carpenter, Receiver of The Chicago Southern Railway Company.

The Cincinnati & Muskingum Valley Railroad Company.

Cincinnati, Georgetown & Portsmouth Railroad Company.

Cincinnati, Bluffton & Chicago Railroad Company.

The Cincinnati, Hamilton & Dayton Railway Company.

The Cincinnati, Lebanon & Northern Railway Company.

The Cincinnati Northern Railroad Company.

The Cleveland, Akron & Columbus Railway Company.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

The Dayton & Union Railroad Company.

The Dayton, Lebanon & Cincinnati Railroad and Terminal Company.

Detroit & Charlevoix Railroad Company.

Detroit & Mackinac Railway Company.

Detroit & Toledo Shore Line Railroad Company.
 George K. Lowell, Benj. S. Warren and Thomas D.
 Rhodes, Receivers of Detroit, Toledo & Ironton Rail-
 way Company.

East Jordan & Southern Railroad Company.

Elgin, Joliet & Eastern Railway Company.

Erie Railroad Company.

Erie & Michigan Railway and Navigation Company.

Fort Wayne, Cincinnati & Louisville Railroad Com-
 pany.

Grand Rapids & Indiana Railway Company.

Grand Trunk Western Railway Company.

The Hocking Valley Railway Company.

Illinois Central Railroad Company.

Indiana Harbor Belt Railroad Company.

Indianapolis Southern Railroad Company.

Interstate Car Transfer Company.

Iowa Central Railway Company.

Kalamazoo, Lake Shore & Chicago Railway Com-
 pany.

The Lake Erie & Western Railroad Company.

The Lake Shore & Michigan Southern Railway
 Company.

Louisville & Nashville Railroad Company.

Louisville, Henderson & St. Louis Railroad Com-
 pany.

Manistee & Grand Rapids Railroad Company.

Manistee & Northeastern Railroad Company.

Michigan Central Railroad Company.

The New York, Chicago & St. Louis Railroad Com-
 pany.

The Northern Ohio Railway Company.

Ohio Electric Railway Company.

The Ohio River & Columbus Railway Company.

Supreme Court of the United States.

October Term, 1911.

No. 776.

RAILROAD COMMISSION OF OHIO,

APPELLANT,

vs.

B. A. WORTHINGTON, Receiver of The Wheeling &
Lake Erie Railroad Company,

APPELLEE.

Motion for Leave to File Exhibits.

Now comes the respondent, and respectfully shows that the exhibits hereto attached will advise the Court of the fact that the Interstate Commerce Commission now has under investigation the readjustment of lake cargo coal rates from the Pennsylvania, West Virginia and Ohio coal districts engaging in such lake cargo coal business, respectively, and that among the parties to said proceedings and investigation are the respondent herein and the complainant before the Railroad Commission of Ohio, upon whose petition the Railroad Commission of Ohio originally made the order, the validity of which is the question sought to be raised by the writ of certiorari asked for herein.

Now, therefore, to the end that the Court, if in its judgment it is proper so to do, may consider this fact in determining the application for the writ, respondent moves the Court for leave to file as exhibits in this cause the following certified copies of records of the Interstate Commerce Commission, together with printed copies of

the same hereto attached, namely:

(a) Order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 26 therein pending, entitled "In the Matter of the Investigation of Increases in Coal Rates by Carriers Serving West Virginia Fields"; and also "Statement of The Norfolk and Western Railway Company in Response to an Order of the Interstate Commerce Commission, Entered on the 23rd day of December, 1910," in the above matter.

(b) Complaint filed with the Interstate Commerce Commission in the case of John W. Boileau vs. The Pittsburgh & Lake Erie Railroad Company, et al., No. 3853;

(c) 1. Complaint filed with the Interstate Commerce Commission in the case of Pittsburg Vein Operators' Association of Ohio vs. Pennsylvania Company, No. 4116; and

2. Complaint filed with the Interstate Commerce Commission in the case of Pittsburg Vein Operators' Association of Ohio vs. The Wheeling & Lake Erie Railroad Company and B. A. Worthington, its Receiver, No. 4116, Sub. 1.

B. A. WORTHINGTON,
Receiver of The Wheeling & Lake Erie
Railroad Company, Respondent.

WM. B. SANDERS,
W. M. DUNCAN,
Counsel for Respondent.

Pennsylvania Company.

The Pennsylvania Railroad Company.

Pere Marquette Railroad Company.

The Pittsburgh, Cincinnati, Chicago & St. Louis
Railway Company.

The Pittsburgh & Lake Erie Railroad Company.

Pontiac, Oxford & Northern Railroad Company.

Rapid Railroad Company.

St. Joseph Valley Railway Company.

St. Louis Merchants Bridge Terminal Railway
Company.

Terminal Railroad Association of St. Louis.

The Toledo & Ohio Central Railway Company.

Toledo, Peoria & Western Railway Company.

Toledo, St. Louis & Western Railroad Company.

Vandalia Railroad Company.

The Wabash Railroad Company.

The Wheeling & Lake Erie Railroad Company.

Wiggins Ferry Company.

A true copy.

(Seal)

EDWARD A. MOSELEY,
Secretary.



BEFORE THE INTERSTATE COMMERCE COM-
MISSION.

I. & S. Docket 26.

In the Matter of Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Norfolk and Western Railway Company.

STATEMENT OF THE NORFOLK AND WESTERN RAILWAY COMPANY IN RESPONSE TO AN ORDER OF THE INTERSTATE COMMERCE COMMISSION ENTERED ON THE 23RD DAY OF DECEMBER, 1910.

The Norfolk and Western Railway Company, in response to an order of the Interstate Commerce Commission requiring it to "submit to the Commission on or before January 20th, 1911, a brief or statement in regular printed form, setting forth any justification they may have for the advanced rates on earload shipments of coal fixed in the above named tariffs (Supplement No. 21 to I. C. C. No. 2387-B) from and to the points named in said tariffs," now comes and respectfully represents to the Commission:

First. That, for a number of years, this Company has recognized that the rates which have existed on the traffic known in this record as "Lake Coal" have been lower than what they should normally and properly be, and that they do not fairly represent the cost of the service or the value of the services incident to the traffic. While their application yields some profit the profit is very small and the return is not adequate.

The joint rates made by this Company on lake coal from the various mining districts located on its railroad

to Sandusky, Ohio, which is the port mainly used by this Company, to which its lake coal is transported, and the respective distances to said port and the rate per ton and the rate per ton one mile, as the same now exists, as well as the proposed rate per ton and rate per ton one mile, are as follows:

DISTRICT	DISTANCE	RATE	Rate per ton per mile.	Proposed rate per ton mile.	Proposed rate.
Pocahontas	..441	\$1.12	2.54 Mills	2.75 Mills	\$1.21½
Tug River	...409	1.12	2.73 "	2.96 "	1.21½
Thacker	...368	.97	2.63 "	2.88 "	1.06½
Kenova	.. .326	.97	2.97 "	3.26 "	1.06½
<hr/>					
Average for all 386					
		\$1.045	2.71 Mills	2.95 Mills	\$1.13½

Second. This Company avers that the above existing lake rates are substantially lower than any coal rates made by this Company to any point whatsoever for the same distance; that they are believed to be lower than any coal rates made in this country by any railway company where the conditions of traffic and transportation are similar to the conditions under which this traffic is carried; and it further avers that tested by any of the commonly accepted standards and measures or by any standards and measures possible to be suggested the said rates cannot be regarded otherwise than unusually low. The existing lake rates to Sandusky and Toledo as well as those which are proposed are much lower than the coal rates proper to said destinations from the same points of origin.

Third. That, for the purpose of performing its duties as a common carrier according to the standards now demanded by the public and to maintain its own efficiency and financial integrity, additional revenue is essen-

tial in order that funds may be available to the Company with which to meet its increasing current expenses and with which to provide a sufficient surplus fund in order to meet the cost of such replacement and those improvements which are proper to be paid out of and charged to the current revenue of the Company and to maintain and protect the credit of the Company.

Fourth. This Company, further responding to the order of said Commission, avers that, whether the reasonableness of its existing rates upon lake coal be considered in and of themselves, or in relation to other rates maintained on similar traffic by this Company, or in comparison with similar rates made by other companies transporting similar traffic under substantially similar conditions, it will appear that the existing rates on lake coal are exceptionally low and that the proposed rates will be in every respect reasonable and lawful; and that this Company should not be compelled to continue to carry this traffic at the present rates under existing conditions; and that under all the facts and circumstances of the case a just regard for the interest of the Company and the public who are dependent upon it for transportation service justify the proposed rates.

When the said order was served on respondent there was nothing in the record to show and no information was given the respondent of the ground upon which complaint had been made of the proposed rates. Since the date of said order, however, there has been recently filed in this proceeding the petition of the Louisville Coal and Coke Company and the Red Jacket Consolidated Coal and Coke Company, containing a statement of their objections to the said rates, and respondent asks that reference may be had to its answer to be made to said peti-

tion for further facts and circumstances which will be pertinent to a response to that petition.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY COMPANY,

By L. E. JOHNSON,
President.

R. WALTON MOORE,
LUCIAN H. COCKE,
JOS. I. DORAN,

Counsel.

January, 1911.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, JUDSON C. CLEMENTS, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached paper is a true copy of an order entered by the Interstate Commerce Commission on November 12, 1910, In the Matter of the Investigation of Increases in Coal Rates by the Norfolk & Western Railway Company, Investigation and Suspension docket No. 26-A, involving rates on coal from producing points on the Norfolk & Western Railway in West Virginia to Lake ports for trans-shipment, covered by Supplement No. 21 to Norfolk & Western Railway Company tariff, I. C. C. No. 2787-B, and statement of the Norfolk & Western Railway Company in response to an order of the Interstate Commerce Commission entered on the 23rd day of December, 1910, in the same proceeding, the originals of which are on file in the office of this Commission, and that the above investigation is now pending before the Commission, in which the Wheeling & Lake Erie Railroad Company was made a party respondent and submitted its statement in accordance with the above last named order, and in which testimony was submitted on September 20-22, 1911, at Washington, D. C.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this Twenty-sixth day of October, 1911.

(Seal.)

JUDSON C. CLEMENTS,
Chairman.

EXHIBIT "B."

INTERSTATE COMMERCE COMMISSION.

JOHN W. BOILEAU, in his own behalf and in behalf
of shippers of Lake Coal from the Pittsburgh Dis-
trict, Pennsylvania, Complainant,

against

THE PITTSBURGH & LAKE ERIE RAILROAD
COMPANY, THE LAKE SHORE & MICHIGAN
SOUTHERN RAILWAY COMPANY, THE
PITTSBURGH, YOUNGSTOWN & ASHTABULA
RAILWAY COMPANY, PITTSBURGH, FORT
WAYNE & CHICAGO RAILWAY COMPANY,
PENNSYLVANIA COMPANY, THE PENNSYL-
VANIA RAILROAD COMPANY, and THE
PITTSBURGH, CINCINNATI, CHICAGO & ST.
LOUIS RAILWAY COMPANY, Defendants.

Petition.

The petition of the above named complainant re-
spectfully shows:

I.

That the complainant is a resident of the city of
Pittsburgh, Pennsylvania, and maintains an office in the
city of Pittsburgh, Pennsylvania, and is engaged in said
city in the business of buying and selling coal lands and
property for himself and others, and is interested and
engaged as a stockholder and bondholder in various coal
and coke producing companies operating in the vicinity
of Pittsburgh, Pennsylvania, in the production and sale
of coal, and all of the lands, both those under sale and
those under operation in which he is interested as afore-
said, are directly affected by the excessive, unreasonable
and discriminatory rates herein complained of; that this
complainant files this petition in his own behalf and in

behalf of numerous owners of coal lands, coal operators and shippers of coal in the Pittsburgh district, by their consent and with their authority; and in behalf also of all owners, operators and shippers similarly situated with said owners, operators and shippers above referred to; that by the term "Pittsburgh district" mentioned above is meant that coal producing territory in and around the city of Pittsburgh, embraced within a radius of forty miles thereof.

II.

That each and all of the above named defendants are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by railroad, between points in different states of the United States, and particularly are engaged in the carriage of lake coal from shipping points in the above described Pittsburgh district in the state of Pennsylvania to Ashtabula Harbor in the state of Ohio and other ports on Lake Erie, from which further carriage is had by water to upper lake ports on the Great Lakes for ultimate destination at consuming points in the states to the north and northwest; and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto. That by lake coal, so designated herein, is meant coal intended for lake ports, to be there loaded into vessels for transshipment to other ports upon the Great Lakes. That the said The Pittsburg & Lake Erie Railway Company enters the said Pittsburgh District, and with its connection, The Lake Shore & Michigan Southern Railway Company, forms a through and continuous line of railway from various shipping points in the said Pittsburgh

District to Ashtabula Harbor in the state of Ohio on Lake Erie, where lake coal is carried, and there trans-shipped from cars and loaded into vessels for further movement by water to the upper Lake ports on Lake Superior and elsewhere upon the Great Lakes; that practically all the stock of the Pittsburgh & Lake Erie Railroad Company is owned by The Lake Shore & Michigan Southern Railway Company, and the said last named company formulates, dictates and directs the policy and affairs of the said The Pittsburgh & Lake Erie Railroad Company. That the said Pittsburgh, Fort Wayne & Chicago Railway Company has its terminus in the city of Pittsburgh, and with its connection, The Pittsburgh, Youngstown & Ashtabula Railway Company, forms a through and continuous line of railway from the Pittsburgh District to said Ashtabula Harbor for the transportation of lake coal for trans-shipment, as hereinabove described; that said Pittsburgh, Fort Wayne & Chicago Railway Company connects with and receives from the Pennsylvania Railroad Company, which serves said Pittsburgh District, coal produced in said Pittsburgh District for transportation to Ashtabula Harbor for trans-shipment as above described; that practically all the common stock of the said The Pittsburgh, Youngstown & Ashtabula Railway Company is owned and held by the Pennsylvania Company, which last named company controls the policy and directs the affairs of the said The Pittsburgh, Youngstown & Ashtabula Railway Company; that the said Pittsburgh, Fort Wayne & Chicago Railway Company is operated under a perpetual lease by the Pennsylvania Company, which last named company exercises all the rights and powers of ownership over and controls the policy and directs the affairs of the Pittsburgh, Fort Wayne & Chicago Rail-

way Company; that the Pennsylvania Company is incorporated under the laws of the state of Pennsylvania and is a subsidiary corporation of the said The Pennsylvania Railroad Company, which last named company controls and directs the policy and business of said Pennsylvania Company, and that the purpose for which said Pennsylvania Company, was organized and is maintained is to manage in the interests of said The Pennsylvania Railroad Company the railroads running west from Pittsburgh and the connecting lines thereof extending west and south, which were previously owned, leased, controlled or operated by said The Pennsylvania Railroad Company; that The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company is one of the railroads running west from Pittsburgh so managed by The Pennsylvania Company as aforesaid, and traverses the Pittsburgh District, connecting with and delivering lake coal to the Pittsburgh, Ft. Wayne & Chicago Railway Company at or near the city of Pittsburgh, for carriage to Ashtabula Harbor.

III.

That the defendants exact for the transportation of lake coal in carloads from shipping points in the Pittsburgh District to ports on Lake Erie as follows:

From Pittsburgh and the territory around said city embraced within a radius of forty miles thereof and known as the Pittsburgh District:

To	Route	Rate per ton	Distance	Rate per ton per mile
Ashtabula Harbor, O.,	Penna. Lines, P. & L. E.,	88 cts.	130 miles	6.77 mills
Ashtabula Harbor, O.,	L. S. & M. S.,	88 cts.	130 miles	6.77 mills

That each of said rates is excessive, unreasonable and unjust and in violation of the provisions of the act to regulate commerce, particularly section one thereof; and said rates are discriminatory and constitute an undue preference and advantage to the shippers of other localities over those of the said Pittsburgh District, and subject said Pittsburgh District to undue and unreasonable prejudice and disadvantage, and that reasonable, just and non-discriminatory and non-preferential rates from said shipping points in said Pittsburgh District to said point of trans-shipment would not exceed fifty cents per ton in earloads of lake coal.

IV.

That said rate of 88 cents per ton in earloads for lake coal from the Pittsburgh district to said port of Ashtabula Harbor on Lake Erie is excessive and unreasonable in and of itself, and greatly and unreasonably in excess of the cost of the transportation and yields a profit to the defendant carriers wholly out of proportion to the cost of service; that the rate per ton per mile of 6.77 mills is an unreasonable and unjust charge for the service and is largely in excess of the fair and average charge for similar service on the defendants' and other railroad lines; that said rate on lake coal, though the lake coal rate is always treated as a proportional of a through rate, is greatly in excess even of the ordinary rate on commercial coal for domestic consumption charged by other railroads for much longer hauls; that said rate is greatly in excess of the commercial rate charged by defendants themselves for similar or longer hauls from other districts; that other railroads carry lake coal from the Kanawha district in West Virginia to Toledo, Ohio, an average distance of three hundred

and fifty-one miles at a rate of 97 cents per ton in carloads, or 2.74 mills per ton per mile; that the rate in carloads per ton on lake coal from the Marrowbone district in Kentucky to Toledo, Ohio, a distance of four hundred and ninety miles is 97 cents per ton or 1.98 mills per ton mile; that the rate from the Fairmont district of West Virginia to Lorain, Ohio, a distance of two hundred and fifty-five miles, is 97 cents per ton for lake coal in carloads, or 3.80 mills per ton mile; that the rate from the New River district of West Virginia to Toledo, Ohio, for the same commodity in carloads is \$1.12 per ton for a distance of four hundred and ninety miles or 2.28 mills per ton mile; that the rate from the Pocahontas district of West Virginia to Sandusky, Ohio, a distance of four hundred and sixty miles is \$1.12 per ton for lake coal in carloads or 2.43 mills per ton per mile; and that the rates on lake coal from other West Virginia districts are similarly less per ton mile than the rate from said Pittsburgh district; that the defendants engaged in the movements of lake coal from the Pittsburgh district to the said port of Ashtabula Harbor on Lake Erie have a large volume of back haul of iron ore and other commodities, almost if not quite equal to the forward movement itself and upon equally as good rates, whereas in the transportation of coal from the said West Virginia and Kentucky districts there is no return freight and the carriers engaged in that trade are under the necessity of hauling back to the coal districts empty cars without any compensation whatever; that the rate on lake coal from the Pittsburgh district to Ashtabula Harbor has been steadily increased from time to time during the past ten years and that the train mile earnings, gross earnings per mile, and net earnings per mile of said de-

fendants has steadily increased; that as to the Pittsburgh and Lake Erie Railroad Company, of whose total freight tonnage eighty per cent. is of low grade commodities and fifty-four per cent. is of coal alone, it has made for the year 1910 gross earnings for its entire mileage of over \$90,000.00 per mile, and net earnings of more than \$52,000.00 per mile, its net earnings being greater than the gross earnings of the next largest earning railroad in the United States.

VI.

That the rates hereinabove mentioned as exacted for the transportation of lake coal in carloads over the defendants' lines of railway from said shipping points in said Pittsburgh district, Pennsylvania, to said lake port of Ashtabula Harbor for trans-shipment, were established and are now maintained in force and exacted by mutual agreement and concert of action by and among all the carriers named as defendants in this proceeding; that the rates hereinabove mentioned, exacted for the transportation of lake coal in carloads from the said Pittsburgh district to the said port of Ashtabula and also the rates charged from the above described coal districts of Kentucky and West Virginia were established and are now maintained in force and exacted by mutual agreement and concert of action by and among the defendants and certain other common carriers serving the said Kentucky and West Virginia districts, to-wit, The Chesapeake & Ohio Railway Company, The Norfolk & Western Railway Company, Louisville & Nashville Railroad Company, The Baltimore & Ohio Railroad Company, The Kanawha & Michigan Railway Company, and certain other railroads and their connections, all common carriers subject to the said act to regulate commerce; and that the rate on lake coal from said

Pittsburgh district fixed as a result of said combination and conspiracy when compared with the rate on lake coal from said West Virginia and Kentucky districts shows gross discriminations and inequalities, and that said defendants, in combination with the other railroads reaching said Kentucky and West Virginia districts as aforesaid and as participators in said conspiracy to fix the lake coal rates have unjustly discriminated and are discriminating against said Pittsburgh district and the shippers therein, and have subjected said district and the shippers therein to undue and unreasonable prejudice and disadvantage, and have given or participated in giving to the said Kentucky and West Virginia districts an undue and unreasonable preference and advantage over said Pittsburgh district.

VII.

That the coal operators, producers and shippers of coal hereinabove referred to in said Pittsburgh district are now engaged in mining, selling and shipping coal to various markets throughout the several states north, east, west and northwest, and a large portion of their shipments has been lake coal to said Lake Erie port of Ashtabula Harbor, for trans-shipment to ports on Lake Superior and other ports on the Great Lakes as hereinbefore described; that said operators, producers and shippers ship said coal from their respective mines in the Pittsburgh district in Pennsylvania to said port on Lake Erie over the lines of railway of defendants as aforesaid; that the northwest trade, designated as the lake trade, is of especial benefit to coal shippers of said district, in that lake coal is mined and shipped during the summer and early fall season, when there is not the demand for other coal, and the production of said lake

coal permits the operation of the mines during such seasons, thus reducing the operating cost and furnishing employment to the employes dependent upon said mines for their livelihood; that said lake coal shipments are especially desirable to railroad companies, since said coal moves in large quantities, frequently in train load lots, is easily and economically handled and the cars in which said shipments are made return laden with ore, and that the shipment of said lake coal in the summer and fall seasons as aforesaid affords opportunity for the continuous employment of the equipment of the railroads which are engaged in a large measure in the transportation of coal, thus making the lake coal business the most desirable of the traffic of such lines of railway. That the said coal producers, operators and shippers in said Pittsburgh district wish to increase their said business, but are prevented from so doing by the excessive and unreasonable rates on transportation hereinabove set forth and by the discriminations hereinabove described. That said operators, producers and shippers in said Pittsburgh district have from time to time during the past three years petitioned said defendant railroad companies for redress of their grievances and a discontinuance of the unjust discriminations above described, and for a reduction of the unreasonable and unjust rates hereinbefore mentioned, and have been from time to time during the period aforesaid promised relief by said defendants, but such relief has been refused them, and a readjustment of said unreasonable rates has not been made.

VIII.

That the said operators, producers and shippers of lake coal in said Pittsburgh district, are obliged to compete and do compete with shippers of lake coal in said Kentucky and West Virginia districts above described; that the cost of producing coal shipped from the Pittsburgh district as aforesaid, is much greater than the cost of producing the coal shipped from points within the states of West Virginia and Kentucky at the mines in said Fairmount, Kanawha, New River and Pocahontas districts and other districts in Kentucky and West Virginia; that the average distance of the lake ports from the shipment points in said Kentucky and West Virginia districts is greater than the average distance to the lake ports serving the Pittsburgh district, but that this difference in distance in favor of coal shipped from the Pittsburgh district is more than off-set by the discriminations in rates and difference in cost of production as above set forth, and that as a consequence the said shippers of coal in the said Pittsburgh district are unable to compete successfully at ultimate destination points with other coal producers of said West Virginia and Kentucky districts, and are deprived of the benefits they would receive from the natural advantage of owning and operating coal mines located much nearer to said lake ports than are the coal mines of their said competitors in West Virginia and Kentucky.

IX.

That as a direct consequence of the excessive rates exacted and discriminations practiced by the defendants as above set forth, the normal increase of tonnage on lake coal produced in said Pittsburgh district of Pennsylvania and shipped to Lake Erie ports, has been re-

tarded, while during the same time the tonnage of coal produced in Kentucky and West Virginia and shipped to the said several lake ports has increased in great volume and out of all proportion to the normal increase, had no such excessive rates been established or maintained or such discriminations practiced.

X.

That by reason of the premises the defendants are and each of them is subjecting the said owners, producers, operators and shippers of coal in the said Pittsburgh district of Pennsylvania to the payment of unreasonable and unjust rates of transportation and said defendants are subjecting said owners, producers, operators and shippers in said Pittsburgh district, and the shippers and the general public located at and in the vicinity of said shipping points in said Pittsburgh district of Pennsylvania and at the consuming or destination points in other states to undue and unreasonable prejudice and disadvantage and giving to the coal producers, operators and shippers and the members of the general public located at the various coal districts above referred to in West Virginia and Kentucky, undue and unreasonable preference and advantage in violation of the provisions of the Act to regulate commerce, particularly sections 1 and 3 thereof.

Wherefore, complainant prays that the defendants may be severally required to answer the charges herein; that, after due hearing and investigation, an order be made commanding said defendants and each of them, to cease and desist from the aforesaid violations of the act to regulate commerce, and apply as maximum rates in the future for the transportation of lake coal (that is, coal destined for trans-shipment from ports on the

Great Lakes), in carloads from said shipping points in the Pittsburgh district in the state of Pennsylvania to said port of trans-shipment at Ashtabula Harbor, in the state of Ohio, such rates of transportation as the Commission may deem reasonable and just and that such other and further order or orders may be made as the Commission may consider proper in the premises or as the complainant's cause may appear to require.

JOHN W. BOILEAU,

Address: Park Bldg., Pittsburgh, Pa.

Dated at Pittsburgh, Pa., Feb. 15, 1911.

WADE H. ELLIS,

Attorney for Petitioner.

Address: 611 Fourteenth St., N. W.,

Washington, D. C.

ELLIS & DONALDSON,

CHALLEN B. ELLIS,

Of Counsel.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, JUDSON C. CLEMENTS, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached paper is a true copy of the petition in the case of John W. Boileau, in his own behalf and in behalf of the shippers of Lake coal from the Pittsburg district in Pennsylvania, against the Pittsburg & Lake Erie Railroad Company and others, docket No. 3853, the original of which is now on file in the office of this Commission, in which proceeding Henry W. McMaster and Francis H. Skelding, as Receivers of The Wabash Pittsburg Terminal Railway Company, have filed intervening petitions, and which was partly heard on April 24-26, 1911, at Washington, D. C.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this Twenty-fifth day of October, 1911.

(Seal.)

JUDSON C. CLEMENTS,

Chairman.

EXHIBIT "C."

No. 4116.

INTERSTATE COMMERCE COMMISSION.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO,

COMPLAINANT,

vs.

PENNSYLVANIA COMPANY, THE PENNSYLVANIA RAILROAD COMPANY,

DEFENDANTS.

Petition.

The petition of the above named complainant respectfully shows:

I.

That complainant is a voluntary association of operators in the No. 8 or Pittsburg vein of coal in the State of Ohio, the members of which own, control and operate sixty-five (65) coal mines in said vein of coal in the State of Ohio, and produce and sell approximately 9,000,000 tons of coal per year; that the place of business of said association is at the Schworm Building, in the City of Massillon and State of Ohio; and that complainant files this petition in its own behalf and in behalf of its various constituent members, whose business is directly affected by the excessive, unreasonable, discriminatory and preferential rates hereinafter complained of.

II.

That said The Pennsylvania Railroad Company is a corporation organized and existing under and by virtue

of the laws of the State of Pennsylvania; that the said Pennsylvania Company is a corporation also organized and existing under and by virtue of the laws of the State of Pennsylvania and is a subsidiary corporation of said The Pennsylvania Railroad Company, which last named Company controls and directs the policy and business of the said Pennsylvania Company, and that the purpose for which the said Pennsylvania Company was organized and is maintained is to manage in the interests of said The Pennsylvania Railroad Company certain railroads running west and south from Pittsburg, which said railroads prior to the organization of the said Pennsylvania Company were owned, leased, controlled or operated by said The Pennsylvania Railroad Company; that said The Cleveland & Pittsburg Railroad Company is a corporation, organized and existing under and by virtue of the laws of the State of Ohio and is one of said railroads running west from Pittsburg, so managed by the said Pennsylvania Company as aforesaid; that said The Cleveland & Pittsburg Railroad Company is operated under a perpetual lease made and executed by said The Cleveland & Pittsburg Railroad Company to said The Pennsylvania Railroad Company, and by said The Pennsylvania Railroad Company assigned to said Pennsylvania Company; that the line of railroad of said The Cleveland & Pittsburg Railroad Company serves, among other localities, a portion of said No. 8 coal field in the State of Ohio, and extends also to the port of Cleveland, Ohio.

That each and all of the above named defendants are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by rail, between points in the different

States of the United States; that said defendants and each of them are also engaged as common carriers in connection with various and sundry water carriers in the transportation of property, partly by railroad and partly by water, between points in the different States of the United States and between points in a State of the United States and a foreign country, to-wit, the Dominion of Canada; that said defendants and each of them are engaged in the transportation of property shipped from a place in the United States to a foreign country, and carried from such place in the United States to a port of trans-shipment; that especially said defendants and each of them are and at all times hereinafter mentioned have been engaged in the carriage and transportation of lake cargo coal from the No. 8 field in the Counties of Harrison, Jefferson and Belmont in the State of Ohio, to the port of Cleveland, located on the southern shore of Lake Erie, in the State of Ohio, which said lake cargo coal at said port of Cleveland has been and now is transferred to lake vessels and has been and now is carried on said lake vessels to points in other States of the United States and to points in a foreign country, to-wit, the Dominion of Canada; that said coal so shipped from said mines to said port of Cleveland for trans-shipment by water in the manner hereinbefore described, is and for a long time has been transported by said defendants and each of them, under an arrangement by the terms of which said defendants agree to transport said coal in car load lots from said mines to said port of Cleveland, and there to unload the same upon vessels to be supplied at said port by said shippers for the reception of said coal, and there distribute or trim said coal in the holds of said vessels, it being understood that said shippers

will furnish lake vessels for the further transportation of said coal by water to points in other States of the United States and to points in the Dominion of Canada; that said railroads and each of them are, therefore, as such common carriers, subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

III.

That on the 10th day of May, 1910, this petitioner filed a certain complaint with the Railroad Commission of Ohio against the Wheeling & Lake Erie Railroad Company and B. A. Worthington, Receiver of said The Wheeling & Lake Erie Railroad Company, in which said complaint the rates and charges imposed by said Receiver and said Company on said lake cargo coal transported by said Receiver and said Company, from said No. 8 field to the ports of Huron and Cleveland, both in the State of Ohio, for transshipment by lake vessels, as aforesaid, were alleged to be unreasonable and unjust, and in which complaint relief from said unjust and unreasonable charges was sought for and asked from said Railroad Commission of Ohio; that later an amended complaint was filed with said Railroad Commission of Ohio, and in due time an answer was filed to said amended complaint by said defendants therein, and that after a hearing before said Railroad Commission of Ohio, in which all parties to said proceeding introduced evidence at length, and after listening to arguments therein and upon due consideration thereof, said Railroad Commission of Ohio on the 28th day of February, 1910, made and entered an order reducing the rate on said lake cargo coal; that thereafter, on the 28th day of March, 1910,

said B. A. Worthington, as Receiver of The Wheeling & Lake Erie Railroad Company, filed a bill in equity in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, complaining of said order of said Railroad Commission of Ohio as an unlawful interference with the interstate commerce engaged in by said B. A. Worthington, Receiver of said The Wheeling & Lake Erie Railroad Company; that in due time an answer in behalf of the Railroad Commission of Ohio was filed in said court to said complaint, and to said answer replication was made; that said cause came on for hearing before said court and said court, after due consideration, found the allegations in said bill of complaint with reference to the character of the traffic or services affected by the order of the Railroad Commission of Ohio to be correct, and found that said traffic or services constituted interstate commerce and thereupon enjoined said Railroad Commission of Ohio from enforcing the terms of said order, said court inclining to the belief and so stating it in his opinion, that the traffic in question was "subject only to the authority of the Interstate Commerce Commission;" that thereafter an appeal was prosecuted from the said order of said court to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, and that on the 2nd day of May, 1911, said Circuit Court of Appeals for the Sixth Circuit affirmed the order and decree of said Circuit Court for the Northern District of Ohio, Eastern Division, on the ground that the traffic or services affected by the order of the Railroad Commission of Ohio, constituted interstate commerce, subject only to regulation by the federal government, said Circuit Court of Appeals also stating in the opinion handed down in said

cause, that the Interstate Commerce Commission had control over the traffic or services under consideration.

IV.

That there are a large number of coal mines owned and operated by the constituent members of your complainant, which are located on and served by said defendants in Jefferson, Harrison and Belmont counties, in the State of Ohio, from which mines many thousand tons of coal per annum are loaded and transferred over the lines of said defendants to said port of Cleveland for trans-shipment by vessel to other points without the State of Ohio, in the manner hereinbefore described; that the distance from said mines in said No. 8 field served by said defendants, to said port of Cleveland, is one hundred and twenty-five (125) miles; that for transporting said coal to said port of Cleveland said defendants demand, charge and collect the sum of Eighty-five Cents (\$.85) per ton in earload lots; that said rate or charge of Eighty-five Cents (\$.85) per ton is excessive, unreasonable and unjust and in violation of the provision of the act to regulate commerce, and is particularly violative of Section 1 of said act; that said rate or charge of Eighty-five Cents (\$.85) per ton is discriminatory and is such as to give to the coal shippers of other localities an undue preference and advantage over those in the No. 8 coal district; that said rate subjects said No. 8 coal district and the shippers therein, to undue and unreasonable prejudice and disadvantage.

V.

That said rate or charge of Eighty-five Cents (\$.85) per ton is excessive and unreasonable in and of itself, and is unreasonably in excess of the cost of performing said

services for which said charge is made, and yields a profit to said defendants wholly out of proportion to the cost of the services rendered; that other railroads carry lake coal from the Kanawha coal district in the State of West Virginia to Toledo, Ohio, an average distance of three hundred and fifty-one (351) miles, at a rate of Ninety-seven Cents (\$.97) per ton; from the Marrowbone district in Kentucky to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for Ninety-seven Cents (\$.97) per ton; from the Fairmont coal district in West Virginia to Lorain, Ohio, a distance of two hundred and fifty-five (255) miles, for Ninety-seven Cents (\$.97) per ton; from the New River coal district in the State of West Virginia to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for One and 12-100 Dollars (\$1.12) per ton; from the Pocahontas coal district in the State of West Virginia to Sandusky, Ohio, a distance of four hundred and sixty (460) miles, for One and 12-100 Dollars (\$1.12) per ton; and that the back haul of iron ore and other commodities from said port of Cleveland to the vicinity of said No. 8 coal field, for said coal cars is much greater on the line of road of defendants, than on the railroads hauling said lake cargo coal from said West Virginia and Kentucky coal fields; that a reasonable, just, nonpreferential and nondiscriminatory rate for the services rendered by said defendants in the transportation of said lake cargo coal from said No. 8 coal field to said port of Cleveland, would be less than forty-seven cents (\$.47) per ton.

VI.

That said rate of eighty-five cents (\$.85) per ton so charged and received for said transportation of lake cargo coal, was established and is now in force under

and pursuant to a mutual agreement and concert of action by and between said defendants and each of them, and certain other common carriers serving said Kentucky and West Virginia coal districts, to-wit, The Chesapeake & Ohio Railway Company, The Norfolk & Western Railway Company, The Louisville & Nashville Railroad Company, The Baltimore & Ohio Railroad Company, The Kanawha & Michigan Railway Company, and other railroads and their connections, all common carriers, subject to the said act to regulate commerce; that said rate on said lake cargo coal from said No. 8 field so fixed as a result of said combination and concert of action, grossly discriminates against and unduly prejudices said No. 8 coal shippers in said No. 8 coal district, to the favor and advantage of said West Virginia and Kentucky coal districts and the coal shippers therein.

VII.

That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States and in the Dominion of Canada with said coal so shipped and transported from said West Virginia and Kentucky coal fields and competes in said northwestern coal markets with said West Virginia and Kentucky coal; that the cost of producing said coal shipped from said No. 8 district is much greater than the cost of producing said West Virginia and Kentucky coals; that the average distance from the West Virginia and Kentucky coal fields to said ports on the southern shore of Lake Erie, from which said coal is trans-shipped by lake vessels to the northwest is much greater than the average distance from the No. 8 district to said port of Cleveland, but that the benefit which should result to said No. 8 coal district, because of its natural advantage in being in

close proximity to said lower lake ports, is more than offset by the discriminations and preferences in said rates in favor of said West Virginia and Kentucky districts, and in the added cost of production in said No. 8 field, and that, therefore, said No. 8 coal field, thus deprived of the benefit of its proximity to the lower lake ports, is unable to compete successfully at the ultimate points of destination of said coal, with said West Virginia and Kentucky coals, which latter coals, because of the excessive, preferential and discriminatory rates charge against said No. 8 coal, are supplying the market for said lake cargo coal to the disadvantage and exclusion of the said No. 8 coal.

VIII.

That within two years prior to the filing of this petition herein, plaintiff's various constituent members have shipped large quantities of said lake cargo coal from said No. 8 coal field to said port of Cleveland for transshipment by vessels to points in the United States, other than Ohio, and to points in the Dominion of Canada; that said rate or charge of eighty-five cents (\$.85) per ton, demanded and collected by said defendants for the transportation of said coal so shipped by complainant's various members, became due and payable and was paid by said members on each ton of said coal so shipped by said members within said period of two years prior to the filing of this petition herein.

IX.

That by reason of the premises said defendants and each of them have been and now are subjecting said complainant and its constituent members, as owners, pro-

ducers, operators and shippers of coal in the said No. 8 coal district of Ohio, to the payment of unreasonable and unjust rates and charges, and have been and now are subjecting said complainant and its said members and the district in which they operate, to unreasonable prejudice and disadvantage, and have been and now are giving to said West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; that there is due the various members of plaintiff association from said defendants and each of them, large sums of money by way of reparation to and as damages due said members because of said overcharges in excess of said reasonable rate of forty-seven cents (\$.47) per ton, which plaintiff claims in behalf of its said members.

WHEREFORE, your petitioner prays that the defendants and each of them may be required to answer the charges herein; that after due hearing and investigation, an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of the act to regulate commerce and to charge, demand and receive as a maximum rate in the future, for the transportation of said lake cargo coal in carload lots from said No. 8 field in the State of Ohio, to said port of Cleveland for trans-shipment by said lake vessels to points in other States and in the Dominion of Canada, such a rate as the Commission may deem reasonable, just, nondiscriminatory and nonpreferential; that said defendants and each of them be ordered and directed to pay to plaintiff's said members, by way of reparation and damages, as aforesaid, such sums of money as said members may be entitled to receive, and that the Com-

mission make such further order or orders as it may consider proper in the premises.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO,

By M. D. RATCHFORD,
Secretary.

Address: Schworm Building, Massillon, Ohio.

M. B. & H. H. JOHNSON,
Attorneys for Petitioner.

Address: 1009 American Trust Bldg., Cleveland, Ohio.

T. H. HOGSETT,
Of Counsel.



No. 4116, Sub. 1.

INTERSTATE COMMERCE COMMISSION.

THE PITTSBURGH VEIN OPERATORS' ASSO-
CIATION OF OHIO,

COMPLAINANT,

vs.

THE WHEELING AND LAKE ERIE RAILROAD
COMPANY and B. A. WORTHINGTON, Receiver
of The Wheeling and Lake Erie Railroad

Company,
DEFENDANTS.

Petition.

The petition of the above named complainant respectively shows:

I.

That the complainant is a voluntary association of operators in the No. 8 or Pittsburgh vein of coal in the State of Ohio, the members of which own, control and operate sixty-five (65) coal mines in said vein of coal in the State of Ohio, and produce and sell approximately 9,000,000 tons of coal per year; that the place of business of said association is at the Schworm Building, in the city of Massillon, and State of Ohio; and that complainant files this petition in its own behalf and in behalf of its various constituent members, whose business is directly affected by the excessive, unreasonable, discriminatory and preferential rates hereinafter complained of.

II.

That said defendant, The Wheeling and Lake Erie Railroad Company is a corporation organized and exist-

ing under and by virtue of the laws of the State of Ohio and that the said defendant, B. A. Worthington, Receiver of said company is duly appointed, qualified and acting as such receiver, under and by virtue of an appointment made by the United States Circuit Court for the Northern District of Ohio, Eastern Division, on the 8th day of June, 1908, in the case of The National Car Wheel Company vs. The Wheeling and Lake Erie Railroad Company, consolidated with The Central Trust Company of New York, Trustee, vs. The Wheeling and Lake Erie Railroad Company, being cause No. 7359 in Equity, consolidated with cause No. 7603.

That said defendant, The Wheeling and Lake Erie Railroad Company, is the owner of a line of railroad located in the State of Ohio, and prior to the appointment of said Receiver operated said railroad and was a common carrier engaged in connection with other common carriers in the transportation of passengers and property, wholly by railroad, between points in the different States of the United States and between points in the United States and an adjacent foreign country, to-wit, the Dominion of Canada, and that prior to the appointment of said Receiver, said defendant, The Wheeling and Lake Erie Railroad Company was also engaged as a common carrier in connection with various and sundry water carriers in the transportation of property, partly by railroad and partly by water, under the conditions and arrangements hereinafter described and referred to, between points in the different States of the United States and between points in a State of the United States and a foreign country, to-wit, the Dominion of Canada; that said B. A. Worthington, Receiver of said The Wheeling and Lake Erie Railroad Company is now and

has since his said appointment as said receiver, been in possession and control of said property of said Railroad Company and since said appointment has been and now is a common carrier engaged in the transportation of passengers and property over the lines of said railroad in the same manner as said The Wheeling and Lake Erie Railroad Company operated said railroad, as hereinbefore described, prior to the appointment of said Receiver; that prior to the appointment of said Receiver said The Wheeling and Lake Erie Railroad Company was and since the appointment of said Receiver, said Receiver has been and now is engaged in the transportation of property shipped from a place in the United States to a foreign country, and carried from such place in the United States to a port of trans-shipment; that especially prior to the appointment of said Receiver, said The Wheeling and Lake Erie Railroad Company had been, and since the appointment of said Receiver, said Receiver has been and now is, engaged in the carriage and transportation of coal from the No. 8 field in the counties of Harrison, Jefferson and Belmont, in the State of Ohio, to certain ports on the southern shore of Lake Erie, to-wit, the ports of Huron and Cleveland, both located within the State of Ohio, which said coal at said ports of Huron and Cleveland has been and now is transferred to lake vessels, and has been and now is carried on said lake vessels to points in other States of the United States and to points in a foreign country, to-wit, the Dominion of Canada; that said coal so shipped from said mines to said lower lake ports for trans-shipment by water in the manner hereinbefore described, is and for a long time has been transported by said defendants and each of them, under a contract of

carriage, by the terms of which said defendants and each of them agree to transport said coal in car-load lots from said mines to said lower lake ports of Huron and Cleveland, and there unload the same upon vessels to be supplied at said ports by said shippers for the reception of said coal, and there distribute said coal in the holds of said vessels, in return for which said shippers agree to pay said defendants at the rate of ninety cents (\$.90) per ton, for all of said services so performed by said defendants, it being further understood that said shippers will furnish lake vessels for the transportation of said coal by water to points in other States of the United States and to points in the Dominion of Canada.

That said railroad and said Receiver, and each of them, is, therefore, as such common carrier, subject to the provisions of the act to regulate commerce, approved February 4th, A. D., 1887, and acts amendatory thereof and supplementary thereto.

III.

That on the 10th day of May, 1909, this petitioner filed a certain complaint with the Railroad Commission of Ohio against said The Wheeling and Lake Erie Railroad Company and said B. A. Worthington, Receiver of said The Wheeling and Lake Erie Railroad Company, in which said complaint the rates and charges herein complained of were alleged to be unreasonable and unjust, and in which complaint relief from said unjust and unreasonable charges was sought for and asked from said Railroad Commission of Ohio; that later an amended complaint was filed with said Railroad Commission of Ohio, and in due time an answer was filed to said amended complaint by said defendants, and that after a hearing before said Railroad Commission of Ohio, in which

all parties to said proceeding introduced evidence at length, and after hearing arguments therein, and upon due consideration said Railroad Commission of Ohio, on the 28th day of February, 1910, made and entered an order requiring said The Wheeling and Lake Erie Railroad Company and said B. A. Worthington as Receiver thereof to thereafter charge for said transportation and unloading services the sum of Seventy Cents (70c) per ton f. o. b. vessel, in carload lots, which rate said Railroad Commission of Ohio found to be a just and reasonable rate; that thereafter on the 28th day of March, 1910, said B. A. Worthington as Receiver of The Wheeling and Lake Erie Railroad Company filed a bill in equity in the Circuit Court of the United States for the Northern District of Ohio and Eastern Division thereof, complaining of said order of said Railroad Commission of Ohio as an unlawful interference with the Interstate Commerce engaged in by said B. A. Worthington, Receiver, and said The Wheeling and Lake Erie Railroad Company; that in due time an answer in behalf of the Railroad Commission of Ohio, was filed in said court to said complaint, and to said answer replication was made; that said cause came on for hearing before said court and said court after due consideration found the allegations in said bill of complaint with reference to the character of the traffic or services affected by the order of the Railroad Commission of Ohio to be correct and found that said traffic or services constituted Interstate Commerce and that said order was an unlawful interference with said Interstate Commerce and thereupon enjoined said Railroad Commission of Ohio from enforcing the terms of said order, said court inclining to the belief and so stating it in his opinion, that the traffic in

question was "subject only to the authority of the Interstate Commerce Commission;" that thereafter an appeal was prosecuted from the said order of said court to the United States Circuit Court of Appeals for the Sixth Circuit sitting at Cincinnati, Ohio, and that on the 2nd day of May, 1911, said Circuit Court of Appeals for the Sixth Circuit affirmed the order and decree of said Circuit Court for the Northern District of Ohio, Eastern Division, on the ground that the traffic or services affected by the order of the Railroad Commission of Ohio constituted interstate commerce, subject only to regulation by the Federal Government, said Circuit Court of Appeals also stating in the opinion handed down in said cause that the Interstate Commerce Commission had control over the traffic or services under consideration.

IV.

That there are sixteen (16) coal mines owned and operated by the constituent members of your complainant, which are located on and served by said Railroad and said Receiver in Jefferson and Harrison counties, in the State of Ohio, from which mines approximately 500,000 tons of coal per annum are loaded and transferred over the lines of said Railroad to said lower lake ports, for trans-shipment by vessel to other points without the State of Ohio, in the manner hereinbefore described; that the average distance from said mines in said No. 8 field, by the line of said Railroad to said port of Cleveland is 128 miles, and the average distance to said port of Huron is 149 miles; that for transporting said coal to each of said ports of Huron and Cleveland, and for unloading the same into said vessels for trans-shipment, as aforesaid, said defendant Receiver demands and charges and collects for said transporting and unload-

ing, the sum of Ninety Cents (\$.90) per ton, in carload lots; that said rate or charge of Ninety Cents (\$.90) per ton is excessive, unreasonable and unjust and in violation of the provisions of the act to regulate commerce, and is particularly violative of section 1 of said act; that said rate or charge of Ninety Cents (\$.90) per ton is discriminatory and is such as to give to the coal shippers of other localities an undue preference and advantage over those in the No. 8 coal district; that said rate subjects said No. 8 coal district to undue and unreasonable prejudice and disadvantage.

V.

That said rate or charge of Ninety Cents (\$.90) per ton f. o. b. vessel is excessive and unreasonable in and of itself, and is unreasonably in excess of the cost of performing said services for which said charge is made, and yields a profit to said defendants wholly out of proportion to the cost of the services rendered; that other railroads carry lake coal from Kanawha coal district in the State of West Virginia, to Toledo, Ohio, an average distance of Three hundred and Fifty-one (351) miles, at a rate of Ninety-seven cents (\$.97) per ton; from the Marrowbone coal district in Kentucky to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for Ninety-seven cents (\$.97) per ton; from the Fairmont coal district in West Virginia to Lorain, Ohio, a distance of two hundred and fifty-five (255) miles, for Ninety-seven (\$.97) per ton; from the New River coal district in the State of West Virginia to Toledo, Ohio, a distance of four hundred and ninety (490) miles, for One Dollar and twelve cents (\$1.12) per ton; from the Pocahontas coal district in the State of West Virginia to Sandusky, Ohio, a distance of four hundred and sixty (460) miles, for

One Dollar and twelve cents (\$1.12) per ton; that said other railroads and each of them, also make an additional charge of Five cents (\$.05) per ton for unloading or transferring said coal from the cars of said railroads to said vessels at said points of transfer at Toledo, Lorain and Sandusky; and that the back haul of iron ore and other commodities from the lower lake ports, for said coal cars is much greater on the line of defendant Railroad than on the railroads hauling said lake coal from said West Virginia and Kentucky coal fields; that so-called railway fuel coal, which is identical in every way with said lake cargo coal, is hauled by said defendants from said No. 8 field to Toledo, under conditions substantially the same as those surrounding the transportation of said lake cargo coal, at a rate of Seventy-two and one-half cents ($72\frac{1}{2}c$) per ton for a haul of about two hundred (200) miles; that a reasonable, just, non-preferential and non-discriminatory rate for the services rendered by said defendants in the transportation of said lake cargo coal from said No. 8 coal field to said points of Huron and Cleveland and the transferring of said coal to said lake vessels at said points, by said defendants would be less than fifty-two cents (\$.52) per ton, f. o. b. vessel.

VI.

That said rate of ninety cents (\$.90) per ton f. o. b. vessel, so charged and received for said transportation and unloading as aforesaid, was established and is now in force under and pursuant to a mutual agreement and concert of action by and between said defendant railroad and said Receiver and certain other common carriers serving the said Kentucky and West Virginia coal districts, to-wit, The Chesapeake & Ohio Railway Com-

pany, The Norfolk & Western Railway Company, The Louisville & Nashville Railroad Company, The Baltimore & Ohio Railroad Company, The Kanawha & Michigan Railway Company and certain other railroads and their connections, all common carriers, subject to the said act to regulate commerce; that said rate on said lake coal from said No. 8 field, so fixed, as a result of said combination and concert of action, grossly discriminates against and unduly prejudices said No. 8 coal shippers and said No. 8 coal district, to the favor and advantage of said West Virginia and Kentucky coal districts and the coal shippers therein.

VII.

That said lake cargo coal so shipped by rail and water, as aforesaid, meets in the northwestern States and in the Dominion of Canada with said coal so shipped and transported from said West Virginia and said Kentucky coal fields, and competes in said northwestern coal markets with said West Virginia and Kentucky coal; that the cost of producing said coal shipped from said No. 8 district, as aforesaid, is much greater than the cost of producing said West Virginia and Kentucky coals; that the average distance from the West Virginia and Kentucky coal fields to the said lower lake ports is much greater than the average distance from the No. 8 district to said lower lake ports, but that the benefit which should result to said No. 8 coal district because of its natural advantage in being in close proximity to said lower lake ports, is more than offset by the discriminations in said rates in favor of said West Virginia and Kentucky districts and in the added cost of production

in said No. 8 field, and that therefore said No. 8 coal field, thus deprived of the benefit of its proximity to the lower lake ports, is unable to compete successfully at the ultimate points of destination of said coal, with said West Virginia and Kentucky coals, which latter coals, because of the excessive and discriminatory rates charged against said No. 8 coal, are supplying the market for said lake cargo coal to the disadvantage and exclusion of said No. 8 coal.

VIII.

That within two years prior to the filing of this petition herein, plaintiff's various constituent members have shipped large quantities of said lake cargo coal from said No. 8 coal field to said ports of Huron and Cleveland for trans-shipment by vessels to points in the United States other than Ohio and to points in the Dominion of Canada; that said rate or charge of 90 cents per ton f. o. b. vessel, demanded and collected by said defendants for said services became due and payable and was paid by plaintiff's said members for the transportation of each and every ton of said lake coal so shipped within said period of two years prior to the filing of this petition herein.

IX.

That by reason of the premises, said defendant Railroad and said defendant Receiver, and each of them, have been and now are subjecting the said complainant and its constituent members, as owners, producers, operators and shippers of coal in the said No. 8 coal district of Ohio, to the payment of unreasonable and unjust rates

II

and charges, and have been and now are subjecting said complainant and its said members and the district in which they operate, to unreasonable prejudice and disadvantage, and have been and now are giving to the West Virginia and Kentucky coal districts and to the coal operators and shippers therein, an undue and unreasonable preference and advantage; that there is due the various members of plaintiff association from said defendants, and each of them, large sums of money, by way of reparation to and as damages due said members, because of said overcharges in excess of said reasonable rate of Fifty-two cents (\$.52) per ton f. o. b. vessel which plaintiff claims in behalf of said members.

WHEREFORE your petitioner prays that the defendants may be required to answer the charges herein and that after due hearing and investigation, an order be made commanding the defendants and each of them to cease and desist from the aforesaid violations of the act to regulate commerce and to charge, demand and receive as a maximum rate in the future for the transportation of said lake cargo coal in carload lots, from said No. 8 field in the State of Ohio, to said ports of Huron and Cleveland, and the unloading of the same at said ports on said lake vessels for trans-shipment by said vessels to points in other States and in the Dominion of Canada, such a rate as the Commission may deem reasonable, just, nondiscriminatory and nonpreferential; that said defendants and each of them be ordered and directed to pay to plaintiff's said members by way of reparation and damages as aforesaid such sums of money as said members may be entitled to receive, and that the Com-

mission make such further order or orders as it may consider proper in the premises.

THE PITTSBURGH VEIN OPERATORS' ASSOCIATION OF OHIO.

By M. D. RATCHFORD,
Secretary.

Address: Schworm Building, Massillon, Ohio.

M. B. & H. H. JOHNSON,
Attorneys for Petitioner.

Address: 1009 American Trust Bldg., Cleveland, Ohio.

T. H. HOGSETT,
Of Counsel.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, JUDSON C. CLEMENTS, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached papers are true copies of the original petitions in the cases of The Pittsburg Vein Operators' Association of Ohio vs. Pennsylvania Company and others, docket No. 4116, and The Pittsburg Vein Operators' Association of Ohio vs. The Wheeling & Lake Erie Railroad Company, filed as Sub No. 1 to the case of The Pittsburg Vein Operators' Association of Ohio vs. Pennsylvania Company and others, the originals of which are now on file in the office of this Commission, which proceedings are now pending before the Commission, in which no testimony has been submitted.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this Twenty-fifth day of October, 1911.

(Seal.)

JUDSON C. CLEMENTS,
Chairman.

225 U. S.

Syllabus.

RAILROAD COMMISSION OF OHIO *v.* WORTHINGTON, RECEIVER OF WHEELING & LAKE ERIE RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION; AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 505, 776. Argued April 15, 16, 1912.—Decided May 27, 1912.

In cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case, but petitions in original proceedings to enforce rights and protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247.

Where the petition of the receiver, appointed in a case dependent on diverse citizenship, invokes the jurisdiction of the Circuit Court not only as ancillary to the receivership but also to protect the estate on grounds involving alleged infractions of the Federal Constitution and rights secured thereby, the case is not one in which the judgment of the Circuit Court of Appeals is made final by the act of 1891, and an appeal lies to this court where the amount in controversy exceeds one thousand dollars.

Where the case can be taken to the Circuit Court of Appeals, the fact that it involves grounds that warrant a direct appeal to this court does not deprive the Circuit Court of Appeals of jurisdiction.

Under the Constitution of the United States, the National Government has exclusive authority to regulate interstate commerce, and any attempt by the State to regulate rates for interstate transportation is void. *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27.

An order made by a state commission under assumed authority of the State, which directly burdens interstate commerce, will be enjoined. *McNeill v. Southern Railway Co.*, 202 U. S. 543.

A rate fixed on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the state destination is, as to merchandise intended for points beyond the State, a burden on interstate commerce and beyond the power of the State to impose, even if the merchandise is billed from a point within the State to the point where the vessel is. *Gulf, Colorado & Santa Fé Railway Co. v. Texas*, 204 U. S. 403, distinguished. Through billing to the point beyond the State is not always necessary to determine that a shipment is interstate. *Southern Pacific Terminal Co. v. Young*, 219 U. S. 498.

A rate fixed by the Ohio Railroad Commission for coal from state points to "on board" vessels at the port of Huron, Ohio, and intended for shipment to some point beyond the State undetermined at time of shipment, and, for convenience, billed to the shippers' own order at Huron, *held* to be a rate affecting interstate shipment and void under the commerce clause of the Constitution as an attempt to regulate interstate commerce.

Quære: whether transportation under the circumstances of this case is such a transportation within the State or to points without the State, partly by railroad and partly by water, as to be within the jurisdiction and control of the Interstate Commerce Commission.

187 Fed. Rep. 965, affirmed.

THE facts, which involve the validity of an order of the Railroad Commission of the State of Ohio fixing and establishing a rate on "lake-cargo coal" and whether such order was void as an attempted regulation of interstate commerce, are stated in the opinion.

Mr. Thomas H. Hogsett, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, *Mr. Frank Davis, Jr.*, and *Mr. Chas. C. Marshall* were on the brief, for appellant.

Mr. W. M. Duncan and *Mr. William B. Sanders* for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

The case originated in a bill filed in the United States Circuit Court for the Northern District of Ohio, Eastern Division, against the Railroad Commission of Ohio and

other parties to enjoin the enforcement of an order of the Commission fixing and establishing a rate of seventy cents a ton on what is called "lake-cargo coal," transported from the Number Eight Coal Field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie, for carriage thence by lake vessels. A permanent injunction was granted in the Circuit Court against the enforcement of the rate, on the ground that it was a regulation of interstate commerce. An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, and that court affirmed the decree of the Circuit Court. (187 Fed. Rep. 965.) From the decree of the Circuit Court of Appeals an appeal was taken to this court. An appeal was also prayed and allowed from the Circuit Court directly to this court, being case No. 505 on the docket of this term, which is submitted with the present case. A petition for a writ of certiorari to the decree of the Circuit Court of Appeals has also been filed and submitted upon briefs.

The first question to be dealt with is one of jurisdiction. The question of the jurisdiction of the Circuit Court of Appeals was raised and decided in that court, which held that it had jurisdiction of the case, also intimating that there were grounds of jurisdiction which might have warranted a direct appeal to this court, and that court allowed the present appeal to this court.

The argument that the jurisdiction of the Circuit Court of Appeals is final is based upon the contention that, as Worthington, the complainant in the present case, was appointed receiver of The Wheeling & Lake Erie Railroad Company in a suit in equity in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, wherein jurisdiction depended upon diversity of citizenship, and since the jurisdiction to entertain an appeal in an ancillary proceeding is that of the original case, therefore, under the Circuit Court of Appeals Act,

the decree of the Court of Appeals is final. It is undoubtedly true that in cases of intervention in foreclosure suits, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case. It is equally true that petitions in original proceedings to enforce rights and to protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247, and the many previous cases in this court therein cited.

An examination of the bill in this case, which was filed under the authority of the Circuit Court, shows that the order of the Commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the Circuit Court of Appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the Circuit Court of Appeals of jurisdiction. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Macfadden v. United States*, 213 U. S. 288.

The question then is: Is this one of the cases made final in the Circuit Court of Appeals by the act creating that court? The sixth section of that act provides that the judgment of the Circuit Court of Appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of \$5,000. The case is therefore one not made final in the Circuit Court of Appeals and the appeal to this court was properly allowed. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397; *Macfadden v. United States*, 213 U. S. 288, 294; *Standard Paint Co. v. Trinidad Asphalt Manufacturing Company*, 220 U. S. 446, 460.

Case No. 505 is dismissed and the petition for writ of certiorari is denied.

Coming now to the merits of the case, the Circuit Court found the facts to be as follows:

"It appears that bituminous coal, such as is mined in the No. 8 District, is classified by the complainant, for tariff purposes, as (a) railway fuel, being coal sold to railroad companies; (b) lake-cargo coal, that is, coal intended for shipment by lake to points in the Northwest; and (c) commercial coal, comprising coal for commercial and domestic use, not included in the first two classes.

"The No. 8 Coal District of Ohio is situated in Jefferson, Harrison and Belmont Counties, and the members of the Pittsburg Vein Operators' Association of Ohio are interested in mining coal in that district. The traffic is large, about 400,000 tons of lake-cargo coal being shipped over

the complainant's railroad from that district in 1909, and transshipped by vessel to points in the Northwest.

"At and prior to the time of the complaint being lodged with the Railroad Commission by the Operators' Association, the tariff rate in force on the complainant's railroad on lake-cargo coal from the No. 8 District to Huron and Cleveland, Ohio, f. o. b. vessel, was ninety cents per ton. The rate covers, in addition to the rail transportation, the service of unloading the coal from the cars into vessels and trimming it in the holds of the vessels, so that they can safely proceed.

"The rate on commercial coal to Huron or Cleveland is \$1.00 per ton.

"The vessels for lake-cargo coal are generally furnished by the operators, but the coal is sometimes sold f. o. b. vessel, the title to the coal in that case passing to the purchaser upon being properly loaded into the vessel.

"The coal in question is shipped from the mines to Huron or Cleveland, principally Huron, where the complainant has large dock facilities and expensive machinery and appliances for unloading coal into vessels, during the season of navigation, simply marked 'Lake coal' consigned to the operator, or to some office employé whose name is used as a mere matter of convenience for the purpose of designating a particular grade of coal. The operator notifies the railroad that at a certain time a vessel will be at Huron to load so many tons of a particular grade of coal. The railroad then picks up such cars of the operator's coal as are necessary to fill the cargo and moves them on to the dock alongside of the vessel, loads the vessel, trims or distributes the coal properly in her hold, and furnishes the shipper with a cargo statement showing the car numbers and weights and total tons of coal in the vessel, on which information the bill of lading for the vessel shipment is made out.

"It appears that all the coal shipped at the lake-cargo

225 U. S.

Opinion of the Court.

rate remains on the cars of the complainant until unloaded into a vessel, unless it should be diverted en route and devoted to some other purpose, but in that case the lake-cargo rate does not apply. For instance, if it should be diverted to commercial use at Huron, the rate on commercial coal, which is \$1.00 a ton, would govern.

"There is testimony to the effect that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what particular ultimate destination it will go, and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, but it is subject to demurrage charge if it remains on the cars beyond a specified time.

"All coal thus loaded in vessels is, and must practically be, carried to points in other States—or to Canada. The lake ports in Ohio receive coal by rail from interior points, but not by boat from other Ohio ports. It might be that a quantity of coal, so small as to be negligible, is unloaded on one of the Ohio islands in Lake Erie, but no substantial importance is claimed for this circumstance nor could be given to it."

This finding of fact was practically approved and adopted in the Circuit Court of Appeals, and we have no occasion to dissent from its correctness.

The question thus presented is: Was the Railroad Commission of Ohio authorized to put in force the rate in question as to lake-cargo coal? It is not necessary to review the cases in this court which have settled beyond peradventure that the National Government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well settled proposition that over interstate commerce transportation rates the State has no jurisdiction and that an attempt to regulate such rates by the State or under its authority is void. *Louisville & Nashville Railroad Company v. Eubank*, 184 U. S. 27.

And an order made by a state commission under assumed authority of the State, which directly burdens or regulates interstate commerce, will be enjoined. *McNeill v. Southern Railway Company*, 202 U. S. 543.

The question is, then, one of fact. Does the transportation which the rate prescribed by the Railroad Commission of Ohio covers constitute interstate commerce?

It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron on Lake Erie. The so-called "lake-cargo coal" is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the State, usually to upper lake ports, and then and only then the seventy-cent rate fixed by the Commission applies. This seventy-cent rate covers the transportation of the coal to Huron, the placing of it on board vessels and, if necessary, trimming it for the continuance of its interstate journey. It is true, as argued by the learned counsel for the Commission, that this coal may be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time, when it is to be put upon vessels and shipped out of the State, but it must always be remembered that this seventy-cent rate applies solely to such coal as is in fact placed upon vessels for carriage to beyond the state points, and, as the Circuit Court said, the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio islands in Lake Erie. The situation then comes to this, that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable

alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage.

Much stress is laid in argument for the Commission upon the fact that the coal is billed only to Huron, and it is said that in that aspect of the case it is controlled by *Gulf, Colorado & Santa Fe Railway Company v. Texas*, 204 U. S. 403. There it was sought to hold a railroad company upon a shipment of corn from Texarkana to Goldthwaite, Texas, for a violation of the regulations of the state railroad commission applicable to intrastate carriers. The company contended that the shipment was in fact an interstate carriage from Hudson, South Dakota, to Goldthwaite, Texas. The facts showed that the corn was carried upon a bill of lading from Hudson to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment. It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination.

That the test of through billing is not necessarily determinative is shown in the late case of *Southern Pacific Terminal Company v. Interstate Commerce Commission and Young*, 219 U. S. 498. In that case Young bought cotton seed cakes at various points in Texas and shipped them to himself at the port of Galveston, where they were prepared for export. This court held that such transportation was within the jurisdiction of the Interstate Commerce Commission and that the special privileges given by the Southern Pacific Terminal Company to Young on the wharf at Galveston were undue preferences in his favor. As to the fact that the shipments were not made on through bills of lading, but were to Galveston from other places in Texas, this court said (p. 527):

"It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol*, 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation.'"

It is contended that this transportation of the coal under the rate fixed by the Railroad Commission is not within the power and authority of the Interstate Commerce Commission under § 1 of the Act to Regulate Commerce, which makes the provisions of the act inapplicable to the transportation of property wholly within one State, and not shipped to or from a foreign country from or to a State or Territory; and, furthermore, that a transportation

225 U. S.

Syllabus.

of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and therefore that the subject-matter in question is left within the state jurisdiction. On the other hand, it is contended that this transportation is within the jurisdiction of the Commission under the Act to Regulate Commerce. It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce and is therefore beyond the power of the State or a commission assuming to act under its authority.

We therefore reach the conclusion that under the facts shown in this case the Railroad Commission, in fixing the rate of seventy cents for the transportation above described, attempted to directly regulate and control interstate commerce, and, for that reason, the enforcement of its order should be enjoined.

Decree affirmed.

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